SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 868

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 886

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL., APPELLANTS,

vs.

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

VOL. I

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[fol. 1] [File endorsement omitted.]

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Equity No. 1039

STATE OF OHIO and PUBLIC UTILITIES COMMISSION OF OHIO

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

PETITION TO ENJOIN ETC., ORDERS OF INTERSTATE COMMERCE COMMISSION—Filed May 22, 1933

To the Honorable District Court of the United States for the Southern District of Ohio, Eastern Division:

The State of Ohio, by John W. Bricker, its Attorney General, who is hereto authorized by resolution of its General Assembly dated May 18, 1933, and directed by order of George White, its Governor, and Public Utilities Commission of Ohio, plaintiffs herein, complain and say:

(1) Plaintiffs bring this suit in equity against the United States of America and the Interstate Commerce Commission under an Act of Congress approved October 22, 1913, known as the District Court Jurisdiction Act, 38 Stat. L. 319, to enjoin, set aside and annul a certain order made by the Interstate Commerce Commission in a proceeding known as No. 25566, Intrastate Rates on Bituminous Coal within the state of Ohio, bearing date May 2, 1933, and to enjoin the enforcement of said order; and to enjoin, set aside and annul another certain order made by the Interstate Commerce Commission in a proceeding known as No. 25885, Surcharge on Bituminous Coal Within the State of Ohio, bearing date May 9, 1933, and to enjoin the enforcement of said order. The Interstate Commerce Commission is hereinafter referred to as the "Commission." Copy of the or-

der (as corrected) in said No. 25566 and the accompanying report, marked "Exhibit A," and copy of the order in said No. 25885 and the accompanying report, marked "Exhibit B;" are hereto attached and by reference made a part hereof.

[fol. 3] 2. The orders herein complained of were not made upon the petition of any party hereto and the matter complained of in the petitions before the Commission in the proceedings in which said orders were made was the alleged effect upon interstate commerce of rates made or controlled by authority of the State of Ohio for the transportation by railroad in interstate commerce of bituminous coal shipped from mines in the State of Ohio, including mines in the Southern District, Eastern Division, thereof.

3. That bituminous coal is produced at and shipped from mines in various mining districts in eastern Ohio known as the Massillon, Middle, Ohio No. 8 and Cambridge districts and in southern Ohio known as the Hocking, Crooksville and Pomeroy districts, to destinations in Ohio and other states of the United States, including among other destinations in northeastern Ohio, particularly Canton, Massillon, Mansfield, Akron, Cleveland, Lorain and Huron. Bituminous coal is likewise produced at and shipped from mines in numerous mining districts in western Pennsylvania, West Virginia, eastern Kentucky, eastern Tennessee and western Virginia and shipped to the same destinations. These coals are of various kinds and qualities but for the purposes for which coals produced in said Ohio districts are used in the said destination territory in northeastern Ohio all of said coals from all of the districts in the states referred to are in competition with one another in said destination territory.

4. That plaintiff, State of Ohio, by virtue of its sovereign powers and under its constitution regulates rates for the transportation of property by railroad between points within its borders, and such regulation is conducted in accordance with powers duly vested in plaintiff, Public Utilities Commission of Ohio, hereinafter referred to as the "Ohio Commission."

5. That pursuant to said powers the Ohio Commission, after full hearing and investigation, on June 30, 1932, made

and issued a report and order in a proceeding before it known as No. 7252, Republic Steel Corporation vs. The Baltimore & Ohio Railroad Company, et al., hereinafter referred to as the "Republic case," copy of which report and order, marked "Exhibit C" is attached hereto and by reference made a part hereof. Said report and order pre-
[fol. 4] scribed maximum reasonable rates on bituminous coal in carloads from the Massillon, Middle-Coshocton and Ohio No. 8 districts in eastern Ohio to Canton and Massillon, Ohio, in the following amounts:

(1) From Brewster (Massillon City No. 8 mine), 60 cents to Massillon and 72 cents to Canton, Ohio;

(2) From North Industry (Black Oak mine No. 2), 60 cents to Canton and 80 cents to Massillon, Ohio;

(3) From all mines and shipping points in the Massillon and Middle-Coshocton districts, except Brewster and North Industry, 80 cents to Canton and Massillon, Ohio;

(4) From all mines and shipping points in the Ohio No. 8 districts, 108 cents to Canton and Massillon, Ohio.

to which the temporary emergency charge of 6 cents per net ton, as authorized in the Ohio Commission's order of December 29, 1931, in Docket No. 7245 was authorized to be added. The shipments to which the above rates apply are all in commerce wholly within the State of Ohio. Said rates were duly published and became effective on August 1, 1932, have been continuously in effect since that date, and are in effect today. Said report and order have not been vacated or modified by the Ohio Commission, or stayed, set aside, or annulled by the Ohio courts, and are today in full force and effect.

6. That also pursuant to said powers, the Ohio Commission, after full hearing and investigation, on July 25, 1932, made and issued a report and order in another proceeding before it, known as No. 7036, Empire Steel Corporation vs. The Baltimore & Ohio Railroad Company, hereinafter referred to as the "Empire case," copy of which report and order, marked "Exhibit D," is attached hereto and by reference made a part hereof. Said report and order prescribed a maximum reasonable rate on bituminous coal in carloads from the Cambridge district to Mansfield, Ohio, of

not to exceed $1.51 per net ton, to which the temporary emergency charge of 6 cents per net ton, as authorized in the Ohio Commission's order of December 29, 1931, in Docket No. 7245 was authorized to be added. The shipments to [fol. 5] which the above rate applies are all in commerce wholly within the State of Ohio. Said rate was duly published and became effective on August 20, 1932, has been continuously in effect since that date, and is in effect today. Said report and order have not been vacated or modified by the Ohio Commission or stayed, set aside, or annulled by the Ohio courts, and are today in full force and effect.

7. That on March 31, 1933, by virtue of the provisions of the tariffs naming the 6 cents per ton emergency charge, referred to in paragraphs 5 and 6 hereof, said emergency charge automatically expired, and tariffs filed by the carriers herein referred to extending the same to September 30, 1933, were suspended by the Ohio Commission and are now under investigation by said Commission in a proceeding entitled Investigation and Suspension Docket No. 139, Proposed Emergency Charges on Ohio Intrastate Traffic, now pending and undecided.

8. That after the issuance of the report and order in the Republic case, The Wheeling & Lake Erie Railway Company, a common carrier by railroad engaged in transportation of property within the State of Ohio and one of the defendants therein, on application duly made, was granted authority by the Ohio Commission to establish upon less than statutory notice rates from mines on its line in the Massillon, Middle-Coshocton and Ohio No. 8 districts to Akron, Cleveland, Lorain and Huron on the lines of The Wheeling & Lake Erie Railway Company, The Lorain & West Virginia Railway Company and The Akron, Canton & Youngstown Railway Company, on the same basis as the rates prescribed by the Ohio Commission in the Republic case. Said rates were as follows:

From Massillon District to Akron 87 cents, to Cleveland $1.08, to Lorain $1.08, to Huron $1.15.

From Middle-Coshocton District to Akron $1.01, to Cleveland $1.22, to Lorain $1.28, to Huron $1.34.

From the Ohio No. 8 District to Akron $1.28, to Cleveland $1.45, to Lorain $1.45, to Huron $1.55.

[fol. 6] Said authority was contained in the Ohio Commission's special permission No. 6492 and Supplement No. 1 thereto, a copy of which, marked "Exhibit E," is attached hereto and by reference made a part hereof. The shipments to which the above rates apply are all in commerce wholly within the State of Ohio. Said rates were duly published and became effective on August 1, 1932, have been continuously in effect since that date and are in effect today.

9. That immediately following the reductions referred to in paragraph 5 hereof, The Pittsburgh & West Virginia Railway Company, also one of the defendants in the Republic case, on application duly made, was granted authority by the Ohio Commission to establish upon less than statutory notice, rates from mines on its lines in the Ohio No. 8 district in the same amounts and to the same destinations as those established by The Wheeling & Lake Erie Railway Company, as described in paragraph 8 hereof. The shipments to which the above rates apply are all in commerce wholly within the State of Ohio. Said rates were duly published and became effective on August 12, 1932, have been continuously in effect since that date and are in effect today.

10. That after the reductions referred to in paragraphs 8 and 9 hereof had become effective, as alleged, The Baltimore & Ohio Railroad Company, The New York Central Railroad Company and The Pennsylvania Railroad Company, also defendants in the Republic case, on application duly made, were granted authority by the Ohio Commission to establish, upon less than statutory notice, rates from mines on their respective lines in the Massillon, Middle-Coshocton and Ohio No. 8 districts, in substantially the same amounts and to the same destination (including Rocky River in addition thereto) as established by the Wheeling & Lake Erie Railway Company, as alleged in paragraph 8 hereof. The shipments to which the above rates apply are all in commerce wholly within the State of Ohio. Said rates were duly published and became effective on September 2, 1932, have been continuously in effect since that date and are in effect today.

[fol. 7] 11. That pursuant to the powers duly vested in it, the Ohio Commission, after full hearing and investigation, on September 15, 1932, made and issued a report and order in a proceeding before it known as No. 8072, In re Inves-

tigation of Rates on Bituminous Coal From the Cambridge, Crooksville and Hocking Districts, copy of which report and order, marked "Exhibit F," is attached hereto and by reference made a part hereof. Said report and order required the Baltimore & Ohio Railroad Company, the Pennsylvania Railroad Company, The New York Central Railroad Company and The Wheeling & Lake Erie Railway Company to cease and desist from publishing, demanding, or collecting for the transportation of bituminous coal in carloads from mines in the Cambridge district to Cleveland, Lorain, Huron, Akron, Orrville and Rocky River, Ohio, and points intermediate thereto, rates which exceed the rates contemporaneously maintained from the Ohio No. 8 district to said destinations, and from mines in the Hocking and Crooksville districts rates which exceed the rates contemporaneously maintained from the Ohio No. 8 district to said destination by a greater number of cents per net ton than prior to the reductions from the Ohio No. 8 district hereinbefore referred to. The shipments to which the above rates apply are all in commerce wholly within the State of Ohio. Said rates were duly published and became effective on September 29, 1932, have been continuously in effect since that date, and are in effect today. Said report and order have not been vacated or modified by the Ohio Commission, or stayed, set aside, or annulled by the Ohio courts, and are today in full force and effect.

12. That pursuant to the powers duly vested in it, the Ohio Commission, after full hearing and investigation, on October 18, 1932, made and issued a report and order in a proceeding before it known as No. 8097, In re investigation of Rates of Bituminous Coal From the Pomeroy District, copy of which report and order, marked "Exhibit G," is attached hereto and by reference made a part hereof. Said report and order required The New York Central Railroad Com- [fol. 8] pany and other carriers joining it in the establishment of joint through rates on bituminous coal from mines on the New York Central Railroad in the Pomeroy district to cease and desist from publishing, demanding, or collecting rates for the transportation of bituminous coal in carloads from mines in the Pomeroy district to Cleveland, Lorain, Huron, Akron, Orrville and Rocky River, Ohio, and points intermediate thereto, which exceed the rates contemporaneously maintained from the Ohio No. 8 district to said

destinations by a greater number of cents per net ton than prior to the reductions from the Ohio No. 8 district hereinbefore referred to. The shipments to which the above rates apply are all in commerce wholly within the State of Ohio. Said rates were duly published and became effective on October 28, 1932, have been continuously in effect since that date, and are in effect today. Said report and order have not been vacated or modified by the Ohio Commission, or stayed, set aside, or annulled by the Ohio courts, and are today in full force and effect.

13. That by order of October 3, 1932, first supplemental order of October 28, 1932, and second supplemental order of December 7, 1932, the Commission instituted the investigation hereinbefore referred to entitled No. 25566, Intrastate Rates on Bituminous Coal within the State of Ohio. After the Commission had held lengthy hearings therein and had received a large amount of evidence and had heard the parties by counsel upon brief and in argument, the Commission issued a report and order therein dated May 2, 1933, being the same report and order referred to in paragraph 1 hereof, copy of which is attached hereto as "Exhibit A." Said order by its terms requires all carriers by railroad operating within the State of Ohio, which were made respondents in said proceeding, on or before June 10, 1933, to increase their rates from mines in the Ohio No. 8, Middle, Massillon, Cambridge, Crooksville, Hocking and Pomeroy districts to destinations in northeastern Ohio, east of a line drawn through Sandusky, Galion and Columbus and north of an east and west line drawn through Columbus, including Canton, Massillon, Mansfield, Cleveland, Lorain, Huron, Akron, Orrville, Rocky River and [fol. 9] intermediate points, to the amounts in effect immediately prior to August 1, 1932.

14. That by order of March 29, 1933, the Commission instituted the investigation hereinbefore referred to entitled No. 25885, Surcharge On Bituminous Coal Within the State of Ohio. After the Commission had held a hearing therein, in the course of which the evidence in No. 25566 was by agreement of counsel duly stipulated into the record in said proceeding, and had heard the parties by counsel in argument, the Commission issued a report and order therein, dated May 9, 1933, but not made public or served upon

respondents therein or on the State of Ohio until May 17, 1933, being the same report and order referred to in paragraph 1 hereof, copy of which is attached hereto as "Exhibit B." Said order by its terms requires all carriers by railroad, operating within the State of Ohio, which were made respondents in said proceeding, on June 10, 1933,

"to establish, put in force, and maintain for the transportation of bituminous coal, in carloads, in intrastate commerce within the State of Ohio, rates which shall not be lower than the rates now in force and applicable to the transportation of such traffic within the State of Ohio, plus the surcharge authorized by the findings in Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 179 I. C. C. 215, and 191 I. C. C. 361, on corresponding interstate traffic, except that the said surcharge shall be added to the basic rates prescribed as minima in Intrastate Rates on Bituminous Coal Within the State of Ohio, I. C. C. decided May 2, 1933, so long as such surcharge is maintained on said interstate traffic in accordance with said findings in Fifteen Per Cent case, 1931, supra."

15. That said order of May 2, 1933, in No. 25566, and said order of May 9, 1933, in No. 25885, herein complained of, [fol. 10] will vitally and adversely affect the interests and rights of plaintiffs and the people of Ohio as follows:

a. Said orders will nullify and set at naught orders of the Ohio Commission herein before referred to.

b. Said orders will obstruct and impede the power of the Ohio Commission to suspend and investigate proposed increased rates.

c. Said orders will require producers and consumers of bituminous coal shipped within the State of Ohio, including plaintiff, the State of Ohio, to pay and bear freight charges at rates higher than the rates now lawfully in effect pursuant to the laws of Ohio, which rates will be unjust, unreasonable and exorbitant and will subject said producers to undue and unreasonable prejudice and disadvantage and will give to producers outside of the State of Ohio an undue and unreasonable preference and advantage, beyond the power of these plaintiffs to correct, although evidence conclusively establishing the fact that said rates were not less than maximum reasonable rates was received by the Commission.

d. Said order of May 9, 1933, in No. 25885 will increase rates within the State of Ohio above those now lawfully in effect, pursuant to the laws of Ohio, at the whim and caprice of the carriers, and without any determination by the Commission that the rates resulting from said increase will be just and reasonable.

16. That plaintiff, the State of Ohio, avers and charges [fol. 11] that it is entitled to regulate, through the Ohio Commission and otherwise, rates for the transportation of bituminous coal by railroad within the State of Ohio, including the rates referred to in the orders herein complained of, and that plaintiff, the State of Ohio, and its people are entitled to have the benefit of the rates on bituminous coal in the State of Ohio now in effect, and have the lawful right to come into this Honorable Court and show to the Court that the orders of the Commission, which will deprive them of the benefit of said rates, which plaintiff, the State of Ohio, avers are absolutely essential to the welfare of itself and its people, are unlawful and should be set aside by this Court upon the grounds hereinafter set forth.

17. That the said orders of the Commission are unlawful because in making said orders the Commission did not exert the power conferred upon it by law to remove undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or undue, unreasonable or unjust discrimination against interstate or foreign commerce caused by rates made or imposed by authority of the State of Ohio, but made the order in the exercise of an assumed power to interfere with rates made or imposed by authority of the State of Ohio which were not less than maximum reasonable rates and which did not cause any such advantage, preference, prejudice, or discrimination, for the purpose of maintaining a supposed commercial and competitive relation between said rates and certain interstate rates on bituminous coal to the same desti- [fol. 12] nations in Ohio, in complete disregard of controlling transportation conditions surrounding said rates, and in doing so the Commission misconstrued the law and exceeded its authority and deprived plaintiff, the State of Ohio, and its people of their rights under the law.

18. Plaintiffs further aver and charge that said orders herein complained of are based upon erroneous constructions of the statutes governing the action and power of the Commission, and upon erroneous conclusions of law made by the Commission, and are not supported by the findings of fact made by the Commission, and said findings are not supported by substantial evidence and are contrary to the evidence in the following particulars:

a. The Commission erroneously held in the report in No. 25566 that the burden of justifying the relationship between the rates made or imposed by authority of the State of Ohio and varous interstate rates was upon plaintiff, the Public Utilities Commission of Ohio, and other parties seeking to defend said Ohio rates, and that only the most convincing evidence would meet the said burden, whereas no such burden rests under the law upon these plaintiffs or others defending the said Ohio rates but, on the contrary, there is a very severe burden upon those attacking rates made or imposed by State authority as unlawful under the provisions of the federal statutes, which burden was not sustained in the proceeding referred to. By reason of said error, every finding and conclusion of the Commission in said proceeding adverse to said Ohio rates is erroneous and of no effect.

[fol. 13] b. The Commission failed to make any finding in the report in No. 25566 with respect to the reasonableness of interstate rates to the destinations in Ohio hereinbefore referred to from tipples on the Ohio River in the Ohio No. 8 district (which rates are applicable exclusively to ex-river coal originating at mines on the Monongahela, Allegheny, and Ohio rivers and moving in interstate commerce), from mines on the Monongahela Railway in northern West Virgina and from mines in districts in southern West Virgina, eastern Kentucky, Tennessee, and Virginia, although Ohio coals are in active and severe competition with coals shipped therefrom to northeastern Ohio. The failure of the Commission to find a reasonable basis of interstate rates from the points referred to, notwithstanding it purported to fix reasonable rates from the Freeport, Pittsburgh, and Connellsville districts and part of the Fairmont district, constituted a fatal defect in the findings required to be made by the Commission in the exercise of the

power purported to be exercised by it, in that, without such finding, it could not fix a reasonable level of interstate rates which is an essential prerequisite to the exercise of the federal power to deal with intrastate rates.

c. The Commission erred in No. 25566 in adopting as a basis for determining whether or not there was a disparity between the interstate rates and the Ohio rates, the rates approved by it as reasonable from the Freeport, Pittsburgh, Connellsville and part of the Fairmont districts, for the reason that the said rates represent but a portion of a group of related groups.

d. The Commission, while it pretended in the report in No. 25566 to make a formal finding that the Ohio rates investigated by it were generally lower, distance considered, than the reasonable interstate rates approved by it, did [fol. 14] not, in truth and in fact, make any such finding in said proceeding and could not have made the same, inasmuch as it appears from the report itself that the Commission refused to measure and judge the relationship between said Ohio rates and the interstate rates with reference to distance and service rendered, but judged the same solely with reference to the alleged competitive equilibrium which said rates, prior to the Ohio reductions hereinbefore referred to, had reached as a result of competition among rival carriers over a long period of years, and the finding which the Commission actually made was that in view of the fact that said rates were in such alleged competitive equilibrium prior to said reductions and the fact that interstate shippers had made large investments in reliance on said equilibrium and that the production, sale, and shipment of coal would be shifted from districts now enjoying the same to other districts as a result of any change therein, said relationships should not be disturbed except upon the most convincing evidence; and in making said finding the Commission exercised the power to regulate the business of producing and selling bituminous coal and competition therein, as distinguished from the business of transporting the same in interstate commerce, which is beyond the power conferred upon the Commission by law.

e. The Commission erred in No. 25566 in condemning the Ohio intrastate rates to Canton, Massillon and Akron on the theory that they departed from the competitive re-

lationships with interstate rates which had grown up over a long period of years as a result of competition among rival carriers, because the uncontradicted evidence of all parties to the proceeding conclusively showed that said rates were not in any way related to any interstate rates but were and are in what is known in the terminology of railroad rates as "No Man's Land", which means that they [fol. 15] do not move up and down automatically in relation with other rates.

f. The Commission erroneously failed and refused, in the reports in Nos. 25566 and 25885, to make any finding with respect to the question whether the Ohio rates investigated by it are per se and intrinsically less than maximum reasonable rates and therefore the cause of the alleged prejudice to interstate commerce, although evidence conclusively establishing the fact that said rates were not less than maximum reasonable rates was received by the Commission in both said cases, and such failure and refusal was a violation of the right of the State of Ohio and its people to have a full hearing and a finding on said question before the sovereign power of the State was invaded by federal authority and the rates made and imposed by authority of the State required to be raised by order of the Commission.

g. That the Commission erroneously failed and refused, in the reports in Nos. 25566 and 25885, to make a finding that the Ohio rates investigated by it are per se and intrinsically less than maximum reasonable rates and therefore do not cause any prejudice to interstate commerce, because evidence was received by the Commission which, as a matter of law, required such a finding, and such failure and refusal was a violation of the right of the State of Ohio and its people to have a full hearing before the sovereign power of the State was invaded by federal authority and the rates made and imposed by authority of the State required to be raised by order of the Commission.

h. That the Commission erroneously found and concluded in the report in No. 25566 that rates on bituminous coal in the State of Ohio, and all other rates, of right ought to be higher than rates on the same kinds of traffic in the [fol. 16] State of Illinois, despite affirmative and uncontradicted proof given by witnesses on both sides of the con-

troversy, that transportation conditions are the same in the two states.

i. That the Commission erred in the report in No. 25566 in that it conceived the issue presented for decision to be the lawfulness of the former Ohio rates in their relation with interstate rates and, with respect to said issue, placed the burden of proof on the parties seeking to justify the reduced Ohio rates, whereas the true issue was with respect to the lawfulness of the reduced Ohio rates and the burden of proof was heavily upon the parties seeking to establish the fact that said rates were in violation of the federal laws.

j. The Commission failed to make any finding, in the reports in Nos. 25566 and 25885, that the continued application of the Ohio rates investigated by it would impair the income of the carriers from the traffic moving on said rates or that the increase in said rates required by the orders herein complained of would increase the income of said carriers, and could not have made such findings or either of them because of the entire absence of evidence to support the same. The lack of any such finding constitutes a fatal defect and makes the orders of the Commission illegal and of no effect.

k. The Commission, in the reports in Nos. 25566 and 25885, erroneously pretended to make a finding that the State rates under investigation resulted in undue, unreasonable and unjust discrimination against interstate commerce, meaning thereby that said rates would impose a revenue burden upon intersfate commerce in that the traffic moving thereon would not pay its fair share towards the support of the interstate commerce transportation system, whereas there was no warrant for such a finding in that the investigation omitted numerous important rates on bituminous [fol. 17] coal and other traffic made and imposed by authority of the State of Ohio, consideration of which would be essential to a finding that Ohio intrastate traffic as a whole was not paying a fair proportion towards the support of the interstate transportation system.

l. The Commission erred in No. 25566 in that it was unduly influenced by the wholly extraneous theory which was not supported by substantial evidence that the effect of the reduced Ohio rates upon the revenues of the carriers must,

be judged with reference to alleged revenue losses resulting from the spread of the Ohio intrastate reductions to interstate districts.

m. The Commission erroneously required by its order in No. 25566 as follows:

"that to the specific rates, or the rates resulting from the bases of rates, found in the said report to be minima for intrastate application as aforesaid, should be added the emergency rates or charges authorized in the Fifteen per Cent Case, 1931, 178 I. C. C. 539, 179 I. C. C. 215; 191 I. C. C. 361; provided, the emergency rates or charges so authorized have been or are contemporaneously added to the interstate rates from Pennsylvania and West Virginia districts to the same destinations."

inasmuch as there was no evidence or finding with respect to the reasonableness of said emergency charges on interstate traffic and no evidence or finding with respect to the revenue effect of failing to add said charges to the Ohio rates under consideration. The reason for the absence of any such evidence or finding is that at the time the evidence in said No. 25566 was taken said emergency charges were in effect on both interstate and Ohio intrastate traffic and there was no issue in said proceeding with respect to the relation between interstate and Ohio rates after the expiration of said emergency charges on Ohio traffic on March 31, 1933.

n. The orders complained of herein are not supported by substantial evidence.

[fol. 18] 19. Plaintiffs further aver and charge that it is apparent upon a reading of the reports of the Commission herein complained of that the motivating cause for the entry of the orders herein complained of was not the condemnation of undue preference and unjust discrimination against interstate shippers and commerce caused by rates made or imposed by authority of the State of Ohio, but was the desire to preserve intact a supposed competitive rate adjustment which ignores distance and service and rests upon the managerial policy of the competing carriers, other than The Wheeling and Lake Erie Railway Company, to make rates on an arbitrary and artificial basis which will

divide the available coal traffic among them on a basis satisfactory to them. It is respectfully submitted that the Commission exceeded its lawful authority and the constitutional authority of Congress in condemning the reduced Ohio rates upon that ground, and it is further submitted that inasmuch as the motivating cause for the Commission's action clearly appears the effect thereof cannot be avoided by the Commission by the use of language in its reports and orders which would be proper in a report and order based upon lawful grounds, and that this Court will look to the substance and not to the form of said reports and orders and judge the same upon the basis of what the Commission in fact did as distinguished from what it purported to do.

20. Plaintiffs further aver that the effect of the orders herein complained of, the purported findings of the Commission to the contrary notwithstanding, will be to cause an undue and unreasonable preference and advantage in favor of interstate shippers, localities and commerce, and an undue and unreasonable prejudice and disadvantage and unjust discrimination against Ohio shippers, localities, and commerce, by reason of the failure and refusal of the Commission to pass upon the reasonableness or require the increase of numerous and important rates on interstate [fol. 19] traffic in bituminous coal, including particularly the rates from tipples in the State of Ohio on the Ohio River and the rates from districts in southern West Virginia, eastern Kentucky, Tennessee, and Virginia, and that the rate relations required by said orders to be maintained will be unduly preferential and prejudicial, unjustly discriminatory, and unlawful, in violation of the Interstate Commerce Act, beyond the power of the Interstate Commerce Commission to require, and beyond the sovereign power of plaintiff, the State of Ohio, to remedy.

21. Plaintiffs further aver and charge that the State of Ohio and its people have invested vast amounts of money in developing coal mines in industrial properties and institutions in Ohio and in preparing and equipping said properties for the production and consumption of Ohio coal; that if the orders herein complained of are permitted to become effective the ability of the owners of said mines to operate the same will be seriously impaired and consumers

of Ohio coal, including the State of Ohio, will either be prevented from securing the same or will be required to pay greatly increased prices therefor, and thereby the people of Ohio engaged in manufacturing and using coal as fuel will be subjected to a grievous handicap in competition with persons engaged in manufacturing in other states, and that, unless the enforcement of said orders is by this Honorable Court enjoined, the State of Ohio and its people will be irreparably injured and damaged in their business and will be deprived of their property without due process of law.

22. Plaintiffs further show that if the orders herein complained of are permitted to take effect, even temporarily, pending final adjudication thereof as to its lawfulness, the State of Ohio and its people will be without means of reparation for the loss to which they would thereby be unlawfully subjected, since the greatly increased rates which would thereby come into effect would drive business from the State, reduce the operating time of mines within the State, [fol. 20] throw miners and other mine employees out of work, increase the cost of production of coal, increase coal prices, seriously injure vast numbers of people and great and important communities throughout the State, and diminish and impair the revenue of plaintiff, the State of Ohio and its political subdivisions, thereby hindering and obstructing it and them in the exercise of indispensable sovereign functions.

23. Plaintiffs are without adequate remedy at law.

24. Wherefore, plaintiffs pray:

(1) That upon the filing of this bill the judge of this Court call to his assistance two other judges, one of whom shall be a circuit judge;

(2) That upon five days' notice of the time and place of hearing having been given to the Attorney General and the Interstate Commerce Commission, plaintiff be granted an interlocutory injunction restraining the United States and the Interstate Commerce Commission from enforcing the terms of the orders herein complained of, pending final decree;

(3) That in view of the fact that said orders require the Ohio rates to be increased on or before June 10, 1933, pending the consideration of this application for an interlocutory injunction, a restraining order be entered to the same effect as the interlocutory injunction prayed for;

(4) That upon final hearing of this cause a decree be entered adjudging each of said orders to be in all respects unlawful and of no effect and ordering each of the same to be abrogated, cancelled and set aside, and permanently enjoining the United States and the Interstate Commerce Commission, their several officers, agents, attorneys, servants and all persons acting in their behalf, from taking any steps to enforce either of said orders; and

[fol. 21] (5) That plaintiffs be given such other, further and general relief, as in equity and good conscience may seem meet.

John W. Bricker, Attorney General of Ohio; Thomas J. Herbert, Assistant Attorney General of Ohio.

Duly sworn to by E. J. Hopple. Jurat omitted in printing.

[fol. 22] EXHIBIT "A" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. 25566[1]

Intrastate Rates on Bituminous Coal Within the State of Ohio

Submitted April 18, 1933. Decided May 2, 1933.

1. Rates on bituminous coal, in carloads, between points in Ohio, found to result in undue prejudice against persons and localities and unjust discrimination against

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[1] This proceeding also embraces Investigation and Suspension Docket No. 3801, Coal from Pennsylvania to Northern Ohio; Investigation and Suspension Docket No. 3833, Coal from Pennsylvania to Northern Ohio (2); No. 25590, Western Pennsylvania Coal Traffic Bureau et al. v. Akron,

interstate commerce. Rates, or bases of rates, prescribed to remove the undue prejudice and unjust discrimination.

2. Rates on bituminous coal, in carloads, from the Pittsburgh, (except from mines on the line of the Pittsburgh & West Virginia Railway Company), Freeport, Connellsville, and Fairmont districts to destinations in northeastern Ohio, found reasonable, except as indicated herein.

3. Proposed increased rates on bituminous coal, in carloads, from the Pittsburgh district on the line of the Pittsburgh & West Virginia Railway Company, to destinations in northeastern Ohio, found justified. Order of suspension vacated and proceeding discontinued.

4. Measure of rates from points on the Monongahela Railway in northern West Virginia and their relationship to the rates from the Pittsburgh and Connellsville districts, reserved for further consideration.

5. Complaints, except Nos. 25656 and 25670, dismissed.

Guernsey Orcutt, M. Carter Hall, D. Lynch Younger, Charles R. Webber, Leo P. Day, John J. Fitzpatrick, W. S. Bronson, R. W. Paisley, Andrew P. Martin, and T. H. Fee for various respondents and defendants.

August G. Gutheim, A. S. Boden, and W. P. Buffington for protestants in Investigation and Suspension Dockets Nos. 3801 and 3833, complainants in No. 25590, and interveners in Nos. 25656, 25657, and 25670; John B. Keeler and A. A. Mattson for complainants in No. 25656 and interveners in Nos. 25590, 25657, and 25670; E. J. McVan for complainants and No. 25657 and interveners in Nos. 25590,

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Canton & Youngstown Railway Company et al.; No. 25656, H. W. Showalter, Receiver, Continental Coal Company et al. v. Akron, Canton & Youngstown Railway Company et al.; No. 25657, Property Owners' Committee et al. v. Akron, Canton & Youngstown Railway Company et al.; and No. 25670, Robert C. Hill, Frank R. Lyon, and Howell Fisher, domiciliary receivers of the Consolidation Coal Company et al. v. Akron, Canton & Youngstown Railway Compony et al.

25656, and 25670; and Henry C. Hall, Alex. M. Bull, and J. F. Graves for complainants in No. 25670, and interveners in Nos. 25590, 25656, and 25657.

[fol. 23] Ernest S. Ballard, D. F. Hurd, T. H. Burgess, R. A. Eldridge, H. D. Rhodehouse, Beecher W. Waltermire, D. H. Armstrong, H. A. Hauxhurst, Andrew H. Brown, Clare B. Tefft, W. M. Lorenz, J. P. Hannan, J. C. Argetsinger, A. C. Graham, W. H. Welsh, James W. Huffman, W. R. Hubbard, H. D. Fenske, A. B. McElvany, Curtis Reed, C. W. Krone, P. E. Fickenscher, John Fox Weiss, Charles Reitell, E. J. Hopple, J. W. Herrold, Walter A. Jones, John G. Hoffstot, H. C. Young, John L. Rogerson, Jr., W. K. Bromley, H. J. Carroll, W. J. McCauley, H. J. Zimmerman, William B. Faulkner, C. F. McBride, G. H. Staat, G. A. Swineford, J. G. Young, Henry L. Goemann, Fred M. Renshaw, and F. M. Garland for various parties.

Report of the Commission

McMANAMY, Commissioner:

Upon petition of the principal railroads operating within the State of Ohio, alleging a violation of section 13 of the interstate commerce act, we entered upon an investigation concerning the lawfulness of all rates and charges for the intrastate transportation of bituminous coal, in carloads, from eastern Ohio mines to destinations in northeastern Ohio from and to which the Public Utilities Commission of Ohio fixed or authorized rates by orders in its dockets shown in the margin [2], and all rates and charges on like traffic permitted by the Ohio Commission to be established from and to the points also named in the margin, and also from the said Ohio mines to points intermediate to the destinations in Ohio to which the rates were required to be reduced under the long-and-short-haul provision of the law

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[2] Nos. 7252, 7036, 8072, and 8079, and Special Permission No. 6492.

From Ohio No. 8, Middle, Massillon, Cambridge, Crooksville, Hocking, and Pomeroy districts.

To Northeastern Ohio, including Canton, Massillon, Mansfield, Cleveland, Lorain, Huron, Akron, Orrville, Rocky River, and intermediate points.

administered by the Ohio Commission, with a view to prescribing such nondiscriminatory, nonprejudicial, and otherwise lawful rates and charges for such traffic as the facts and circumstances may warrant. Petitioners ask for a finding that the rates required, authorized, or permitted to be established by the Ohio Commission are unlawful, and cause an undue and unreasonable advantage, preference, and prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce on the other hand, and an undue, unreasonable, and unjust discrimination against interstate commerce. An order requiring removal of the advantage, preference, prejudice, and discrimination is sought.

The issues raised in the Investigation and Suspension, and complaint cases embraced in this proceeding will be discussed following consideration of those under the thirteenth section petitions. Rates will be stated herein in amounts per net ton of 2,000 pounds, unless otherwise indicated, and do not include the surcharge of 6 cents per ton which was applicable on both State and interstate traffic in addition to the rates shown herein at the time of the [fol. 24] hearings in this proceeding, but was made inapplicable in the State of Ohio effective April 1, 1933. The relationship between the rates on bituminous coal to northeastern Ohio on intrastate and interstate shipments is an issue in this proceeding and our decision with respect thereto will dispose of the issue concerning the application of the surcharge to that territory. The propriety of reestablishing the 6-cent surcharge on bituminous coal between all points in Ohio is the subject of a general investigation instituted in No. 25885, Surcharge on Bituminous Coal Within the State of Ohio, now pending.

The thirteenth section proceedings under consideration were instituted in consequence of reductions in rates on bituminous coal from points or mining groups in eastern Ohio to that portion of Ohio lying east of the Sandusky-Galion line and north of an east-and-west line drawn through Columbus including Canton, Massillon, Cleveland, Lorain, Huron, Akron, Orrville, Rocky River, and intermediate points, which reductions were established, authorized or permitted by the Ohio Commission. The first re-

ductions took effect August 1, 1932, as required in Ohio Commission Docket No. 7252, Republic Steel Corp. v. Baltimore & Ohio R. R. Co., as follows:

	From							
	Brewster and Massillon City No. 8 mines in the Massillon district (W. & L. E.)		North Industry and Black Oak No. 2 mines in the Middle district (B. & O.)		All other points in the Massillon and Middle districts		Ohio No. 8 district	
	Rates in cents per net ton							
To	Prior	Established August 1, 1932	Prior	Established August 1, 1932	Prior	Established August 1, 1932	Prior	Established August 1, 1932
Massilon, Ohio	64	60	101	80	101	80	126	108
Canton, Ohio	101	72	76	60	101	80	126	108

Prior to the effective date of the rates in the foregoing table the Wheeling & Lake Erie Railway Company, hereinafter termed the Wheeling, sought permission of the Ohio Commission to establish reduced rates from its mines in Ohio No. 8, Middle-Coshocton and Massillon districts to Cleveland, Huron, Lorain, Akron and inter-mediate points on the lines of the Wheeling, the Lorain & West Virginia Railway Company, and the Akron, Canton & Youngstown Railway Company. This permission, No. 6492, was granted and the following illustrates these reductions which were also made on August 1, 1932.

	Ohio No. 8 district		Middle district		Massillon district	
To	Prior	Established August 1, 1932	Prior	Established August 1, 1932	Prior	Established August 1, 1932
	Rates in cents per net ton					
Cleveland, Ohio	174	145	154	122	154	180
Huron, Do	174	155	164	134	159	115
Lorain and So. Lorain, Do	174	145	154	128	154	108
Akron, Do	151	128	126	101	126	87

[fol. 25] Immediately following these reductions the Pittsburgh & West Virginia Railway Company sought and obtained permission to reduce its rates a similar amount from its Ohio No. 8 district to the destinations shown, and these reductions took effect August 12, 1932.

Thereafter the Baltimore & Ohio Railroad Company, the New York Central Railroad Company and the Pennsylvania Railroad Company sought and obtained permission of the Ohio Commission also to reduce their rates from Ohio No. 8, Middle Coschocton and Massillon districts to Cleveland, Lorain, Huron, Akron, Rocky River, and Orrville. These reductions were substantially the same as made by the other carriers, and became effective September 2, 1932.

As a result of a general investigation instituted in Ohio Commission Docket No. 8072 the Baltimore & Ohio, the Pennsylvania, the New York Central, the Wheeling, and the Pittsburgh & West Virginia were required to reduce their rates from the Cambridge, Crooksville and Hocking districts on September 29, 1932, by substantially the same amount as the reductions from the Ohio No. 8 district to the same destinations.

On October 28, 1932, the New York Central was required in Ohio Commission Docket No. 8097 to reduce its rates from the Pomeroy district to northeastern Ohio by substantially the same amount as the reductions from the Ohio No. 8 district. The findings of the Ohio Commission in its Nos. 8072 and 8097 required the reduced rates from the Hocking, Crooksville and Pomeroy districts to be established only via available routes through nonaffected territory to hold inviolate the findings in Ohio-Michigan Coal Cases, 80 I. C. C. 663.

On August 20, 1932, the Baltimore & Ohio was required to reduce its rate from the Cambridge district to Mansfield from $1,76 to $1.51 in Ohio Commission Docket No. 7036. All of the reduced rates resulting from the several orders of the Ohio Commission are published to expire on August 1, 1933, except those resulting from the orders in Nos. 7252 and 7036.

The prior and reduced rates between typical points in Ohio and the present interstate rates from and to the points or groups under consideration, together with the average distances over the short tariff routes as set forth in exhibits are reproduced in Appendix A hereto.

As will be observed from the foregoing the reduction from Ohio No. 8 to Cleveland and Lorain was 29 cents. Similar reductions were made to Orrville and Rocky River. The rate from the Pittsburgh district to these destinations has for many years been 10 cents over Ohio No. 8, or $1.84.

No change was made in the rate from the Pittsburgh district, except by the Pittsburgh & West Virginia. The carrier's witness testified that as his company was required to reduce its rates from Ohio No. 8 to northeastern Ohio, he felt it necessary to make the same reduction from mines on that line in the Pittsburgh district to the same destinations to avoid undue prejudice. Accordingly in I. & S. No. 3801 that carrier proposed to reduce its rates from the Pittsburgh group to northeastern Ohio, effective September 9, 1932. Typical reductions from the Pittsburgh district on the Pittsburgh & West Virginia were made to Cleveland, Lorain and Huron. The former rate of $1.84 was reduced to $1.55 to the first two named destinations and to $1.65 to the last destination. After these rates were suspended we vacated our order on October 3, 1932, in so far as reductions were concerned but continued the investigation and the reduced rates took effect. In consequence of the cancellation [fol. 26] of certain forms of concurrences the Pittsburgh & West Virginia was compelled to undertake the restoration of the prior rates from the Pittsburgh district to northeastern Ohio. Upon publication of the increased rates they were suspended in I. & S. No. 3833, until July 27, 1933, and represent an issue in this proceeding.

In consequence of the reductions in the rates under consideration from eastern Ohio mining districts to northeastern Ohio, interstate shippers of bituminous coal, principally operators, located in the Pittsburgh, Freeport, Connellsville, Fairmont, Pocahontas, Tug River, New River, Winding Gulf, Kenova-Thacker, Kanawha, and Logan groups and generally including the inner and outer crescent mines in Pennsylvania, northern West Virginia, Virginia and eastern Kentucky, filed complaints consolidated for hearing and disposition with the present proceeding. These complaints allege that the rates from these mining groups to northeastern Ohio are unreasonable, in most instances, and in every instance include an allegation under sections 3 and 13 of the act charging favoritism of the eastern Ohio mining districts on bituminous coal to northeastern Ohio, and discrimination against interstate commerce. The details of these complaints will presently be discussed.

The Pittsburgh district rate to Youngstown, Ohio, was considered in Youngstown Sheet & Tube Co. v. P. & L. E. R. R. Co., 29 I. C. C. 428, where the then existing rate of

70 cents was found not unreasonable. Before and since that finding the Ohio No. 8 rate to Youngstown has been the same as the rate from the Pittsburgh district to that destination. The Pittsburgh-Youngstown rate has sometimes been termed the "key rate" in the adjustment to northeastern Ohio, on which the Pittsburgh district rates to this territory have been built. Bituminous Coal to C. F. A. Territory, 46 I. C. C. 66, 73. The Pittsburgh district rate to Cleveland at the time the last named case was decided was $1, which formed the basis for the then existing rate of $1 from the southern Ohio districts to Toledo, Ohio. Later, we established a rate of $1.89 from southern Ohio to Toledo and, to maintain the existing parity, the same rate was made to apply to Cleveland. Upon these rates the entire relative adjustment in this territory has developed. Rates from the Pittsburgh district to northeastern Ohio have for years been made a fixed differential over Ohio No. 8; Connellsville a fixed differential over Pittsburgh; and Fairmont a fixed differential over Connellsville. And from the southern West Virginia and Kentucky fields rates have been constructed differentially over eastern or southern Ohio.

The reductions in the State of Ohio were made applicable by restricted routes in order to avoid a change in rates to intermediate points which are located in so-called affected territory to which rates were fixed in Ohio-Michigan Coal Cases, supra. As previously stated, prior to the reductions in the Ohio rates the rate from Ohio No. 8 and Cambridge groups had for many years been 10 cents less than from the Pittsburgh group to Cleveland and many other destinations in northeastern Ohio. The reductions in Ohio increased this differential to 39 cents. Since April 1, 1933, when the surcharge of 6 cents was removed from Ohio intrastate traffic, the differential has become 45 cents.

The destination territory embraces a highly industrialized area in which intense competition exists between industries producing similar products, particularly those producing iron and steel and by-product coke. The important steel producing points are Cleveland, Lorain, Canton, Massillon, Mansfield, and Youngstown, and all of these except Mansfield manufacture by-product coke. These industries compete also with like industries in other States. Northeastern Ohio is served principally by the Pennsylvania, the New York Central, the Baltimore & Ohio, the

Wheeling and the Nickel Plate-Erie system. All of these [fol. 27] carriers participate both in the rates and the transportation of bituminous coal from Ohio mines as well as from the inner and outer crescent mines to northeastern Ohio. Indicative of the extent of the State and interstate movement from these mines, the total tonnage of bituminous coal for the years 1922 to 1932, inclusive, from these various origins to the principal destinations in northeastern Ohio is shown in Appendix B. In addition to the total tonnages shown to the principal destinations, there is a very substantial movement from the inner and outer crescents to Youngstown and the Mahoning Valley group. Much of this coal, however, is special purpose coal and is not strictly or wholly competitive with the Ohio coal. For example, in 1929 about eight million tons moved from the crescents to Youngstown and the Mahoning Valley group; and 134,364 tons from Ohio; about 6 million tons from the former and 93,371 tons from the latter, in 1930; and about four million tons from the former and 345,542 tons from the latter, in 1931.

Generally, the coals produced in western Pennsylvania, Ohio, and northern West Virginia are high volatile coals. The Ohio production is generally accepted as usable for steam and domestic purposes only. The quality of the coal gradually changes as one travels from eastern Ohio in a general southeasterly direction and becomes more of a gas, coking and special-purpose coal, until the Connellsville district of western Pennsylvania is reached, where the coal is a very high grade coking coal. All of the special-purpose coal is usable for steam and domestic purposes also, and in this respect this coal competes with the Ohio coals, although not all of the Ohio coals are competitive with all of the western Pennsylvania coals. Coal from the Freeport district is used almost entirely for steam purposes, but occasionally for special purposes. A line drawn approximately north and south through the city of Pittsburgh divides the purely steam and domestic coal in the Pittsburgh district lying to the west of the line, from the gas, coking and metallurgical coals lying to the east of the line. In the Pittsburgh district the coal on the Pittsburgh & West Virginia, the Montour, and the Pennsylvania Lines, West, is steam and domestic coal. All the coal on the Baltimore & Ohio, the Pennsylvania Lines, East, and the Pitts-

burgh & Lake Erie is special-purpose coal. It is estimated that the minimum tonnage of steam and domestic coal shipped from western Pennsylvania districts to Cleveland and Lorain is 71 per cent of the total shipments to those two points. A recent year's study shows that over four million tons of coal were shipped from western Pennsylvania to northeastern Ohio of which two and one-half to three million tons consisted of steam and domestic coal competitive with the coal shipped from Ohio.

Numerous retail dealers at Cleveland and other northeastern Ohio destinations testified that since the rates were reduced between Ohio points they have been unable to market coal from the crescents because of the relatively higher price. They explain that they can shrink their profits to meet the differences in rates that existed prior to August 1, 1932, but since that time the Ohio operators' rates have been so much lower than those from the crescents that it has been impossible to meet the Ohio competition. A witness for the Pittsburgh Coal Company testified in great detail regarding his lost business at Cleveland since the reductions in Ohio. He classified his customers A, B, C and D. Class A customers consisted of dealers ten of whom discontinued buying coal upon the Ohio reductions. Class B customers are those who elected to make no new contracts but continued to buy on spot market basis. All of these customers, numbering fifteen, were lost after the Ohio reductions, and the tonnage amounted to 646,900 tons annually. Class C customers are [fol. 28] those who bought regularly from year to year but under no contract. Sixty of these were lost and their tonnage amounted to 149,700 tons annually. Class D are customers who bought from time to time. Thirty-nine of these were lost and their tonnage amounted to 123,800 tons annually. Most of these customers are retail dealers and all of this coal was for steam and domestic use. This witness testified that conditions will not change with respect to the marketing of Pittsburgh coal in Ohio until the rate situation is altered.

Another witness, representing a coal producer in the Kanawha and Kenova-Thacker districts, also described his loss of business and difficulty in competing with Ohio mines since the reductions took effect. Similar testimony was given by many other coal operators who have previously

shipped their coal to northeastern Ohio to a considerable extent. For example, a witness representing a coal producer on the Monongahela Railway in the Fairmont district estimated that his loss of tonnage to northeastern Ohio would be about 300,000 tons annually because of the reductions made in the Ohio rates. The record is replete with similar instances, including testimony of a representative of the Public Service Commission of Pennsylvania that that State is losing its coal shipments to Ohio and southern fields and that the restoration of the former relationships in rates with the Ohio fields to northeastern Ohio is vital to the mining districts of Pennsylvania. Witnesses testified that since the reduction in the Ohio rates the tonnage from Ohio mines to Cleveland has increased.

Steam and domestic coal from western Pennsylvania, Virginia, West Virginia, and eastern Kentucky is shipped to northeastern Ohio in competition with Ohio coal. The general tonnage figures are shown in Appendix B, but specific figures indicating the kinds of coal sold at these Ohio destinations are in evidence for certain periods of movement. Great quantities of steam and domestic coal move from the Pittsburgh and Fairmont districts to Cleveland, Lorain, South Lorain, Akron, Canton, East Canton, and Massillon. Witnesses testified that steam and domestic coal from interstate points is sold at such points as Canton and Massillon, which are virtually in the Ohio coal fields. One exhibit shows that there was a movement of steam and domestic coal from the Pittsburgh and Fairmont districts to both Canton and Massillon in 1931. The kinds of coal shipped to these points in 1932 are not indicated, but the evidence indicates that the same character of competition between state and interstate shipments continued in that year.

The percentage of bituminous coal to all freight of the following carriers is shown:

	1929	1930	1931	First six months 1932
Baltimore & Ohio	44.71	44.38	45.92	51.73
New York Central	41.47	43.21	42.14	44.81
Pennsylvania Railr	38.0	40.0	41.36	44.01
Pittsburgh & Lake Erie	41.0	45.0	55.3	62.9

If the present Ohio intrastate reductions and the Pittsburgh & West Virginia interstate reduction continued and spread to other interstate fields, herein affected, the esti-

mated revenue losses to the carriers would be $44,108,248.61 and $29,649,265.34 based on the 1929 and 1931 tonnages, respectively. Detailed figures of the losses of revenue because of the reductions here under consideration will presently be discussed.

[fol. 29] Petitioning respondents contend that the former Ohio intrastate rates which they seek to have restored were fairly aligned with the level of interstate rates between representative points. To establish this contention they compare the former rates in Ohio, as indicated in Appendix A, with rates from the Pittsburgh district to Ashtabula, Ohio, 162.2 miles, $1.84; to Canton, 143.4 miles, $1.59; to Warren, Pa., 218.2 miles, $2.09; and to Youngstown, 96.4 miles, $1.34. Rates to Warren are shown from the Reynoldsville district, 84.5 miles, $1.50; from the Fairmont district, 115.7 miles, $1.70; and from the Aladdin district, 123.4 miles, $1.80.

They contend that the foregoing list of rates and many others either prescribed or approved in this territory are on a reasonable basis and correspond with many others in the same territory. They also instance a rate of $1.90 established from the Pittsburgh district to Hydetown, Pa., 134 miles, maintaining the differential relationship under a group rate of $2.05 prescribed to the Buffalo group in National Petroleum Asso. v. Baltimore & O. R. Co., 163 I. C. C. 625. This distance to Hydetown compares favorably with the haul from Middle and Ohio No. 8 districts to Cleveland as indicated in Appendix A. The rate of $2.05 prescribed in the last named case from the Pittsburgh district applies to Warren, 210 miles, and is on a higher level than the former rates to Cleveland from the more remote Ohio groups, such as Cambridge, Hocking, and Pomeroy, where the distances are substantially greater. In Kistler Leather Co. v. Pittsburgh, S. & N. R. Co., 169 I. C. C. 247, a rate of $1.90 was prescribed from mines in the Reynoldsville district of Pennsylvania to Olean, N. Y., although the short line distance was only 86 miles, and the average from all mines in the group 155 miles. In Wickwire Spencer Steel Corp. v. Director General, 88 I. C. C. 54, a rate of $1.75 was prescribed during Federal control from Leetonia, Ohio, to Harriet, N. Y., 251 miles. This rate subjected to the general changes in rates since that time would now be $2.20. In Carnegie Steel Co. v. P. R. R. Co., 107 I. C. C. 676, a

rate of $1.84 was prescribed from Ohio origins to Munhall, Pa., 78 miles. It is significant that the rates relied on by complainants in that case consisted of rates from Ohio mines to 46 destinations in Ohio and Pennsylvania which averaged $1.523 for an average distance of 83.3 miles. In Hagerstown Chamber of Commerce v. Western M. Ry. Co., 147 I. C. C. 463, a rate of $2.33 per ton of 2240 pounds, the equivalent of $2.08 per ton of 2000 pounds, was prescribed from the Cumberland-Piedmont district to Hagerstown, Md., and Waynesboro, Pa., for Hauls of 137 and 156 miles, and $2.46 per ton of 2240 pounds, the equivalent of $2.20 per ton of 2000 pounds, to Union Bridge, Md., 179 Miles. In Republic Iron & Steel Co. v. B. & O. R. R. Co., 83 I. C. C. 429, a rate of $1.50 from Russellton, Pa., in the Freeport, district, to Youngstown, 85 miles, was found not unreasonable. These rates are also typical of the rates prescribed or approved in Endicott-Johnson Corp v. E. R. R. Co., 73 I. C. C. 562; Balcron Coal Co. v. Bessemer & L. E. R. Co., 161 I. C. C. 307; Bedford Pulp & Paper Co. v. Chesapeake & O. Ry. Co., 163 I. C. C. 670; Staunton Brick Co. v. Chesapeake & O. Ry. Co., 190 I. C. C. 302; Virginia State Corporation Comm. v. Norfolk & W. Ry. Co., 190 I. C. C. 325; and in Bash & Co. v. B. & O. R. R. Co., 96 I. C. C. 178. The record is replete with comparisons of this nature to indicate that the former rates in Ohio were not higher than rates in the same general territory and that the reduced rates are on a lower basis than prevail on interstate shipments of bituminous coal from the Appalachian district.

[fol. 30] The evidence as to the character of the rates on the interstate shipments to Ohio destinations will be discussed in connection with the evidence in the complaint and answer cases.

The Wheeling contends that regardless of the reductions in the rates from Ohio No. 8 district to Cleveland, South Lorain, Huron, Canton, Massillon, and Akron the present reduced rates are maximum reasonable rates. In support of this contention a cost study was introduced. In respect of the movement from this coal district to each of these destinations the study shows, per ton, (1) the gross received under the rate; (2) the absorbed switching charges paid out of this revenue; (3) the operating revenue remaining after payment of switching absorptions; and (4) the

estimated transportation cost (operating expenses and deficit from passenger train operations); (5) the net operating revenue left after deducting absorbed switching charges and estimated transportation cost; (6) the percentage that such net operating revenue is of the gross revenue received from the rate; and (7) the operating ratio, or relationship of estimated transportation cost to operating revenue remaining after payment of absorbed switching charges. A summary of the results of the study is shown as appendix C.

The estimated transportation costs shown are claimed to be the results of a careful study based, (a) upon representative service operations involved in the transportation of coal from this district to th several destinations during the months of January and July of the years 1930 and 1931; (b) upon average unit costs calculated from the total freight service operating expenses of the Wheeling for the two-year period ended December 31, 1931; and (c) upon the tabulation from the records of the Wheeling and of the Akron, Canton & Youngstown Railway of such additional data as were found necessary for a determination of the required units of service and the proper cost to be applied to such units. The evidence shows that in making the study the months of January and July were used in order that the effect upon operations of both winter and summer weather, as well as traffic conditions, might be fairly reflected in the results; and that the two-year period ended December 31, 1931, was used in the derivation of unit costs, because it was deemed to be representative by reason of the fact that it was intermediate between the heavy traffic year of 1929 and the low traffic year of 1932.

The coal from the mines in this district is assembled at Pine Valley, Ohio, the Wheeling's principal train terminal in the district and at three other points short distances west thereof. Through trains, handled by one locomotive each, and carrying coal for all of the several destinations, originate at Pine Valley and move through to Brewster, a distance of about 63 miles, where the trains are broken up and the cars of coal are placed in other trains for further movement to the respective destinations. Due to an adverse grade some 9.06 miles in length between Adena and Rexford, the tonnage rating of all classes of locomotives from Pine Valley to Rexford is approximately 50 per cent of the

rating from Rexford to Brewster. In lieu of operating the through trains out of Pine Valley or Adena with full Rexford to Brewster tonnage rating by furnishing a helper engine to Rexford, the practice is to supplement the through trains by puller train service from Pine Valley and the other assembling points to Jewett, a point about 5 miles west of Rexford. The cars of coal moved from the assembling points to Jewett by the puller trains are placed in the through trains at that point to fill them out to full tonnage rating to Brewster.

[fol. 31] The distance from Pine Valley to the respective destinations are shown in the study to be as follows: To Cleveland, 138 miles; to South Lorain, 137 miles; to Huron, 145 miles; to Canton, 76 miles; to Massillon, 73 miles; and to Akron (Mogadore)*, 99 miles.

The study is predicated upon the number of service units of each kind involved in assembling the coal, and in moving it in through trains from Pine Valley to each of the respective destinations, and returning the empty cars to the coal district, to which the Wheeling's average freight service operating expense per unit for the respective units is applied. To the estimated operating expense per ton for transporting the coal, to the several destinations, amounts ranging from 1.7 to 2.3 cents per ton are added for deficit from passenger train operation, these amounts being 2.89 per cent of the estimated transportation expense from the coal district to the respective destinations, and this percentage being the ratio of the amount of the deficit from passenger train operation to the amount of the total freight service operating expenses.

Inasmuch as trains are not operated through from the coal district to the several destinations, but are broken up at Brewster, it was necessary to estimate the number of service units of each kind that would be involved for imaginary or hypothetical trains assumed to be operated through from this district to each of the six destinations. This was approximately done on the basis of data compiled from the conductors' train reports and other records of the carrier, and certain averages derived therefrom.

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*Mogadore is the junction with the A.C.&Y. From this junction the coal is moved to industries in Akron by A.C.&Y. yard engines.

Petitioning respondents criticize the cost study in various respects. They call attention to the fact that total expenses are combined with total units to develop system averages, and that these are then generally applied to specific operations which are not themselves spread over the system, and say that this is a fundamental objection to cost studies of this kind which has been frequently recognized by the Commission. They point out that maintenance expenses during 1930 and 1931 were drastically reduced as compared with normal years on account of the general depression, and testify that such expenses therefore can not be typical of the expenses during a normal period. In this connection they refer to the fact that the freight train car repair expenses in 1931 were less than one-half the amount of these expenses in 1930, while the number of serviceable car-days was somewhat greater in 1931 than in 1930. They also claim that the track maintenance expenses per unit for the two-year period ended December 31, 1931, used in the study, were substantially less than the corresponding expenses per unit for the five-year period 1927 to 1931, inclusive. They criticize the methods employed in deriving the system average operating expense per service unit as being erroneous in several respects, and they claim that not all of the service units involved were taken into account in arriving at the estimated costs of transporting coal to the several destinations. They also point out that the estimated transportation costs do not include the cost of handling company material or non-revenue traffic.

An analysis of the cost study leaves no doubt that the transportation costs are underestimated to a substantial extent for several reasons.

One of these is the use of the two-year period ended December 31, 1931, instead of a more normal period, as the basis for the derivation of unit costs. In view of the drastic [fol. 32] reductions shown to have been made in the maintenance expenses during this period, it can hardly be regarded as representative of the expenditures per unit normally required to be made for maintenance of way and maintenance of equipment.

Another is the use of hypothetical through trains from the coal district to the several destinations, as the basis for estimating the number of service units involved in

transporting coal to these destinations, instead of the trains in which the coal was actually handled, as shown in the study. Using the trains in which the coal was actually handled, the same data as to unit costs, and following the same general methods of computation employed in the study, but computing the costs separately for the movement from the coal district to Brewster and for the movement from Brewster to each of the six destinations, and adding the two figures together in the case of each destination, it has been found that the costs shown in the study are underestimated on this account to the extent as follows:

From	To	Cost shown in study underestimated Per cent
Pine Valley	Cleveland	12.09
do	South Lorain	10.68
do	Huron	6.32
do	Canton	7.20
do	Massillon	11.04
do	Akron	11.21

The failure to include in the estimated transportation costs all of the service units involved in returning the empty cars to the coal district, as well as the failure to include in these costs the expense of transporting company material or non-revenue traffic, is responsible for the understatement of the costs to an unknown extent.

In view of these things, as well as other imperfections in the study, it is certain that the estimated transportation costs do not represent an accurate and reliable measure of the probable actual costs. On this account the results of the study can not be used as the sole guide as to what the maximum reasonable rates should be for the transportation services here involved.

Cost studies of other carriers operating in this territory are not in evidence.

Extensive evidence was submitted on behalf of the Eastern Ohio Coal Operators Association in the form of locomotive performance charts intended to indicate the operating conditions surrounding the movement of coal

both in intrastate and interstate commerce between the points here under consideration, and in the Indiana-Illinois territory where a relatively lower level of rates applied prior to the Ohio reductions. These locomotive tractive effort charts purport to show the average pounds of tractive power required to haul one gross ton (car and lading) one mile over the various routes traversed by the coal shipments under consideration. The computations are based on the maximum available tractive power of the locomotive and upon the movement of a theoretical solid train load of coal loaded to the full tonnage rating of the locomotives.

[fol. 33] It is not deemed that any useful purpose would be served by reciting the elaborate portrayal of figures presented by the operators, as witnesses for the petitioning carriers have pointed out twenty-one alleged categories of errors including mathematical errors in calculations, erroneous use of data concerning locomotives not operating on the divisions shown, failure to include all of the locomotives that transport coal over some of the divisions, and many other defects too numerous here to set forth in full. In general, it is testified that to undertake to correct the figures would be a burdensome task. Witnesses for petitioning respondents testify that the locomotive charts introduced do not represent the burden of transportation or relative operating conditions, and that neither locomotive tonnage rating nor locomotive tractive effort, even if correctly stated, gage the conditions encountered in actual operation.

Theoretical or calculated tractive effort is not usually employed in fixing tonnage ratings, which are determined by use of dynamometer cars or actual road tests. We are not convinced that computations based on the rated tractive power of locomotives, even if correctly computed, are an accurate or reliable measure of operating conditions on different lines. Many variables are encountered in actual operation, among which may be mentioned differences in locomotives, in the character and density of traffic on the different lines, the need for expeditious transportation, and other traffic conditions which may materially reduce the weight of trains actually handled.

It is unnecessary to give further consideration to the tractive-effort figures so far as the relation of conditions

between northeastern Ohio and the Pittsburgh and other districts outside the State of Ohio are concerned. Witnesses for petitioning respondents are in accord in their testimony that there are no substantial differences between the transportation conditions in eastern and northeastern Ohio and those prevailing from the Pittsburgh group or any of the other groups west of the mountains in the inner and outer crescent groups, to northeastern Ohio. A witness for the Pennsylvania Railroad testified that a mile of service one place is substantially the same as a mile of service in another place in this general territory.

Locomotive tractive-effort figures introduced to establish the relative transportation conditions in Illinois and from Indiana to Illinois possess the same infirmities as those introduced as to Ohio conditions. In addition to the twenty-one alleged infirmities the proper terminal points or distances are not shown in the Illinois exhibits.

It was frequently referred to in this proceeding that the reduced rates in Ohio were established on the basis of the rates prescribed for application in Illinois, Intrastate Rates on Bituminous Coal in Illinois, 182 I. C. C. 537, and from Indiana to Illinois in Coal Trade Assn. v. Baltimore & O. R. Co., 185 I. C. C. 225; 190 I. C. C. 743. Elaborate comparisons were made between the Ohio reduced rates and those prescribed in the Illinois territory. This evidence has had our consideration. It is generally conceded that the basis of rates on coal in the Illinois territory is the lowest in the country. This has greatly been brought about by a competitive condition differing from that in the Ohio territory, although some testimony was introduced to indicate that the actual operating conditions in Illinois are not more favorable than in Ohio. Chicago, in [fol. 34] the Illinois territory, is the greatest coal market in this country, and, as stated in Intrastate Rates on Bituminous Coal in Illinois, supra, consumes annually 30 to 35 million tons of coal. It was also there stated that the rate level to Chicago is the result of keen competition between producers of eastern coal, moved both by rail and water-and-rail, and producers of Illinois and Indiana coals. Like competition also exists between carriers that have their own rails extending from particular groups in Illinois and Indiana to Chicago and whose principal interest

is to move coal from their own mines. The rates to Chicago have had a depressing effect upon other rates on bituminous coal in this territory and have resulted in the establishment many years ago of a competitive basis of rates that is on a very low level. These rates have been maintained, more especially to enable Illinois producers to dispose of their coal in competition with eastern coal. The volume of coal consumed at even the largest consuming point in the Ohio territory is strikingly less than consumed at Chicago. This is indicated in appendix B, although the total tonnage to Youngstown is not there shown but heretofore set forth in the text of this report.

The rates in the Indiana-Illinois territory have never been related to the rates in Ohio or Pennsylvania. The State of Illinois, as well as the western part of Indiana, is underlaid with a vast coal deposit from near the northern to the southern boundaries. Farther to the south is the west Kentucky field, likewise producing large quantities of coal competing in the same consuming territory where Illinois and Indiana mine operators must find their markets. Consequently, intense competition exists at every point in the State of Illinois which is a market for coal. Substantially every rate on which coal is moving in this section was established voluntarily by the carriers or by orders of the Illinois Commerce Commission or by us, and these rates have been established with primary regard for competition, and without regard for existing rates in other territories. The intense competition within the State of Illinois and Indiana has been the subject considered in numerous cases before us. Coal is not moved from the Indiana-Illinois territory to northeastern Ohio. The conditions that led us to establish the basis of rates in the Indiana-Illinois territory are not present in northeastern Ohio.

Highly competitive conditions on bituminous coal exist in Ohio, but the situation confronting the carriers in that territory differs both in type of influences as well as in intensity.

That rates on various commodities in Illinois territory are lower than rates on the same commodities throughout central territory has been indicated in may cases. For example, this principle find support in Durabilt Steel Lock

Co. v. N. Y. C. R. R. Co, 144 I. C. C. 232, as to sheet steel; in Concrete Roofing Slabs, 107 I. C. C. 335, as to roofing slabs; and in Royster Guano Co. v. M. C. R. R. Co., 104 I. C. C. 151, and Hamm Co. v. B. & O. R. R. Co. 120 I. C. C. 345, as to sulphuric acid. Similar findings have been made with respect to tar, pitch, scrap iron, and certain other commodities moving under peculiar conditions existing in the Illinois territory. Another striking example of this principle is found with respect to the rates on sand, gravel, and crushed stone, on which lower scales of rates were prescribed in Illinois than in Ohio under thirteenth section proceedings somewhat similar to the one here presented. [fol. 35] The Pittsburgh & West Virginia also relies to a great extent upon the Indiana-Illinois rates to justify its reductions from the Pittsburgh district to northeastern Ohio destinations. Its reductions corresponded to the reductions made from mines served by it in Ohio No. 8 district. When this respondent undertook to restore the former rates from the Pittsburgh district they were suspended, as previously stated, and constitute the issue in I. & S. No. 3833. Witness for this respondent conceded that the maintenance of a different basis of rates from mines on its line in the Pittsburgh district than from mines on other lines in the same district is improper. At the same time it is the desire of this respondent to maintain the established differential of 10 cents under the Pittsburgh district rates from its mines in Ohio No. 8 to Cleveland and many other northeastern Ohio destinations. Much of the testimony introduced by this respondent has been discussed in other portions of this report and need not be reiterated.

A number of mines, known as river mines, are on or adjacent to the Monongahela, Allegheny, and upper Ohio rivers. With few exceptions they are of the captive class and ship their coal by river to affiliated iron and steel companies in the Pittsburgh, Steubenville, and Wheeling districts. Most of these mines are in the Connellsville district, some are in the Pittsburgh district, and none in the Freeport district. Thirty per cent of the production in the three western Pennsylvania districts can move originally by barge, the other seventy per cent is restricted to the all-rail routes. There are some river mines served by the Wheeling & Lake Erie in the Ohio No. 8 district, and there

are mines directly across the Ohio River which can reach river transfers in the No. 8 district.

Prior to the establishment of the ex-river rates on bituminous coal from Ohio river points, presently to be discussed, several manufacturers of iron and steel articles in the Youngstown district felt that the absence of water and rail routes on coal to Youngstown placed them at a disadvantage as compared with Pittsburgh manufacturers who use river-and-water routes, and supported an application of the Pittsburgh, Lisbon & Western Railroad to construct extensions of its lines to Smiths Ferry, Ohio, and to Youngstown. Those extensions were designed to form a through route from the river mines to Youngstown. The application was denied in Construction of Branches by Pittsburgh, L. & W. R. Co., 150 I. C. C. 43, and 150 I. C. C. 619, hereafter called the Lisbon case, on the representation of the Pennsylvania and Pittsburgh & Lake Erie that they would provide adequate service and reasonable rates in connection with river transportation.

Pursuant to a proposal made in the Lisbon case, the Pennsylvania and Pittsburgh & Lake Erie, prior to the completion of facilities for transferring coal from barges to cars, filed schedules proposing to establish a proportional rate of $1.02 on ex-river coal to Youngstown and certain intermediate points from Conway, Pa., over the Pennsylvania, and from Colona, Pa., over the Pittsburgh & Lake Erie. The proposed rate was found not justified by Division 5 in Bituminous Coal to Youngstown, 163 I. C. C. 3, hereinafter referred to as the First Ex-River case, without prejudice to the establishment of a rate of 77 cents per net ton. In that case Division 5 referred particularly to the relationships between the all-rail rates from the western Pennsylvania districts to Ohio destinations. From the Pittsburgh and Connellsville districts, the rates to Canton are 25 cents, and to Cleveland are 50 cents over the rates to Youngstown. Neither respondents nor protestants at Canton or Cleveland desired the relationships disturbed in the establishment of the ex-river rate proposed. In determining the rate that respondents were permitted to establish, Division 5 considered its relationship to other rates which might result from the extension of the same rate-making principle to Cleveland,

[fol. 36]

Canton, Massillon, and other points of large consumption in central territory. The effect will presently be discussed.

By schedules filed to become effective June 22, 1931, the Wheeling and its subsidiary, the Lorain & West Virginia, proposed to establish rates of 95 cents to Canton and Massillon and $1.10 to Cleveland, Lorain, and South Lorain, minimum 50,000 pounds, on ex-river bituminous coal from Brilliant, Martin's Ferry, Mingo Junction, Rush Run, Steubenville, Stringer, Terminal Junction, Tiltonville, Warrenton, and Yorkville, Ohio. The proposed rates were found not justified by Division 4 in Ex-Ohio-River Coal to Ohio Points, 185 I. C. C. 211, hereinafter called the Second Ex-River case, without prejudice to the establishment of rates of $1.02 to Canton and Massillon and $1.27 to Cleveland, Lorain, and South Lorain. There, as in the preceding case, consideration was given to the effect which the proposed rates and the rates found lawful would have on the general coal rate structure. After citing Trunk-line and Ex-Lake Iron Ore Rates, 69 I. C. C. 589, and Grain and Grain Products, 115 I. C. C. 153, to the effect that proposed rates are unreasonable and unlawful if they are calculated to upset or seriously menace a lawfully established general rate structure, Division 4 said:

> That a large volume of the coal movement from mines along the Monongahela and Allegheny Rivers to the destinations here considered will be diverted from the all-rail routes to the barge-rail routes through the Wheeling's river division if the proposed ex-river rates become effective seems evident, unless corresponding reductions are made in the all-rail rates. We are of the view that the establishment of the proposed ex-river rates would lead to a disruption of the all-rail rate structure on coal, not only from the Pittsburgh, Connellsville, and Fairmont and Ohio No. 8 districts to the destinations here considered, but to other points in central territory and from other coal districts, or that it would have marked effects upon the distribution and marketing of coal as between the river mines and the inland mines which latter must continue to pay the all-rail rates. In either of those events the revenues of some of the carriers and their ability to render satisfactory service would be impaired, and, in the alternative last mentioned, there is a possibility of the inland

mines being practically shut out of the markets, at least as to by-product coal.

The rates found lawful in the First and Second Ex-River [fol. 37] cases were established July 16, 1932. The ton-mile earnings under the 77-cent rate to Youngstown are 18.5 mills from Colona, 41.7 miles, and 17.9 mills from Conway, 43 miles. The ton-mile earnings under the $1.02-rate from Mingo Junction are 12 mills to Massillon, 85 miles, and 11.1 mills to Canton, 92 miles. From Mingo Junction to Cleveland, 152 miles, and Lorain, 154 miles, the respective ten-mile earnings are 8.4 and 8.2 mills under the rate of $1.27. The following tonnage of bituminous coal has moved from the points from which ex-river rates were established on July 16, 1932: From Mingo Junction, 74,589 tons to Cleveland, and 107,870 tons to Lorain; from Martins Ferry, 29,524 tons to Cleveland, 1,841 tons to Lorain, and 147 tons to Massillon; from Conway, 1,759 tons to Cleveland, 1,720 tons to Canton, 29,584 tons to Youngstown, and 14,683 tons to Warren, Ohio; from Colona, 16,075 tons to Cleveland, 8,995 tons to Lorain, 41,446 tons to Youngstown, and 25,967 tons to Ceico, Ohio; and from Bridgeport, 42,800 tons to Cleveland, and 6,011 tons to Lorain, total 403,011 tons. Prior to July 16, 1932, the river-and-rail movement to those destinations was negligible.

The establishment of the ex-river rates was one of the considerations which led the Wheeling to reduce the rates to Cleveland, Lorain, and other northeastern Ohio destinations effective August 1, 1932. The Pittsburgh & West Virginia immediately applied for and received permission from the Ohio Commission to meet the reduced rates of the Wheeling. As previously shown, the other trunk lines serving the eastern Ohio districts reduced their rates, although it was apparent that the reductions would disrupt long-standing differential relationships between interstate and intrastate movements.

A petition to reopen the First and Second Ex-River cases for rehearing and reconsideration was denied. Later a second petition was filed which was set for oral argument with the present proceedings. The merits of that petition will be considered separately from this report.

The value of comparisons between the charges over the all-rail and rail-and-water routes is dependent upon the accuracy with which the charges to and at the ports can

be determined. The tariffs of the Pennsylvania at Conway and of the Pittsburgh & Lake Erie at Colona provide a charge of 12 cents per net ton for transferring coal from barges to cars. The carriers serving the other ports state in their tariffs that they will not furnish services or facilities to effect such transfers and that the charges for any terminal services at the ports will be in addition to the line-haul rates.

The respondents in the Second Ex-River case asserted that the barge rate was 45 cents per net ton from the so-called sixth pool in the center of the Connellsville district to the Wheeling's river division. The protestants in that case contended that the 45-cent charge was excessive and that coal was being transported in large quantities for 31 cents per net ton from the sixth pool to Weirton, W. Va., across the Ohio River about 7 miles from Mingo Junction. To determine the present charges for barge movements, the Wheeling purchased four loads of coal which were shipped by river-and-rail routes to Canton and introduced evidence concerning them in this proceeding. One of the barge loads was shipped from a Monongahela River mine in the Pittsburgh district, another from a mine in the Connellsville district, and two were shipped from Ohio River mines in the Pittsburgh district. The coal from the Monongahela River mines was transferred from barges to cars at Conway, and the coal from the Ohio River mines was transferred at Martin's Ferry. The barge charge from the Monongahela mines to Conway was 25 cents per net ton [fol. 38] and the transfer charge at that point was 12 cents per net ton. The charges for the river transportation to Martin's Ferry and the transfer at that point were 15 cents per net ton on the coal from one of the Ohio River mines and 18 cents per net ton from the other. There is nothing in the record to indicate that those charges are less than ordinarily would be made for the water transportation and transfer services. The following table sets forth the river-and-rail rates to representative destinations based on the above charges and the all-rail rates from the Pittsburgh, Connellsville, and Ohio No. 8 districts:

	To	
	Canton and Massillon	Cleveland and Lorain
	Per net ton	Per net ton
River-and-rail rates:		
From Ohio River mines in the Pittsburgh district	$1.20[1]	$1.45[1]
From Monongahela River mines in the Pittsburgh and Connellsville districts	1.39[2]	1.64[2]
All-rail rates:		
From Pittsburgh district	1.59[3]	1.84[3]
From Connellsville district	1.65	1.90
From Ohio No. 8 district (prior to reductions)	1.26	1.74
From Ohio No. 8 district (present rates)	1.08	1.45

[1] Based on a charge of 18 cents for the water movement and transfer service.
[2] Based on a charge of 25 cents for the water movement and a charge of 12 cents for the transfer service.
[3] Via P. & W. V. Ry., the rate is $1.55.

It is apparent from the above table that the reductions in barge charges disrupted the relationship between rail-and-water and all-rail rates which Division 4 in its findings in the Second Ex-River case sought to establish. It is doubtful, however, if the differences between the rail-and-water rates from the Ohio River mines in the Pittsburgh district and the all-rail rates from mines in the Ohio No. 8 district were sufficient to divert much coal traffic to Canton and Massillon from the all-rail routes. Nor was it necessary to reduce the rates from the Ohio No. 8 district to Canton and Massillon below the rail-and-water rates or the rates from that district to Cleveland and Lorain to approximately the rail-and-water level of rates from the Ohio River mines in order to place the Ohio No. 8 mines on a competitive basis with the Ohio River mines in the Pittsburgh district.

The differences between the all-rail and rail-and-water rates in many instances are too great. That issue is not here presented. This increase, however, should be sufficient only to permit mines restricted to all-rail routes to compete with those having river outlets in order to maintain rail-and-water rates on a level which will induce the free movement of coal by barge and encourage and develop water transportation in furtherance of the policy declared by Congress in section 500 of the Transportation Act, 1920. Domestic coal is not ordinarily moved by river because of the degredation that takes place in dumping, but much special

purpose coal and coal for steam purposes used in the iron and steel industry can move by barge without injury as it is required to be broken up or otherwise disintegrated before usage. As previously stated, the petitions seeking reopening of the ex-river cases to determine this issue are now before us for consideration.

Nos. 25590, 25656, 25670, and 25657

The issues raised in the complaint and answer cases in- [fol. 39] clude alleged violations of sections 1, 3 and 13 of the act, except No. 25657 which includes only sections 3 and 13. The allegations are shown in the margin.

In No. 25590 it is alleged that the rates on bituminous coal, in carloads, to destinations in northeastern Ohio from mines in the Freeport, Pittsburgh, (except mines on the Pittsburgh & West Virginia Railway), and Connellsville districts were and are unjust and unreasonable in violation of section 1 of the act; unduly prejudicial against persons and localities in the Pittsburgh district not located on the Pittsburgh & West Virginia Railway, and unduly preferential of competitors located on the last named railway in violation of section 3 of the act; and unduly prejudicial against persons and localities in the Freeport, Pittsburgh (except mines on the Pittsburgh & West Virginia Railway), and Connellsville districts, on the one hand, and unduly preferential of competitors located in eastern Ohio districts, on the other, in violation of sections 3 and 13 of the act. Reasonable and non-prejudicial rates are sought for the future.

In No. 25656 it is alleged that the rates on bituminous coal, in carloads, to destinations in northeastern Ohio from complainants' mines located on the Monongahela Railway in northern West Virginia are unjust and unreasonable in violation of section 1 of the act; unduly prejudicial against complainants and unduly preferential of their competitors located in the Pittsburgh and Connellsville districts in violation of section 3 of the act; and are unduly prejudicial against persons and localities on the Monongahela Railway in northern West Virginia, on the one hand, and unduly preferential of their competitors located in the eastern Ohio districts, on the other, in violation of sections 3 and 13 of the act. Reasonable and nonprejudicial rates are sought for the future.

In No. 25670 it is alleged that the rates on bituminous coal, in carloads, to destinations in northeastern Ohio from complainants' mines in the Fairmont district in northern West Virginia are unreasonable in violation of section 1 of the act; unduly prejudicial against persons and localities in the Fairmont district, on the one hand, and unduly preferential of persons and localities in the Pittsburgh district located on the Pittsburgh & West Virginia Railway, on the other, in violation of section 3 of the act; and unduly prejudicial against persons and localities in the Fairmont district, on the other hand and undnly preferential of persons and localities in the eastern Ohio district, on the other hand, in violation of section 13 of the act. Reasonable and nonprejudicial rates are sought for the future.

In No. 25657 it is alleged that the rates on bituminous coal in carloads, to destinations in northeastern Ohio from complainants' mines located in Virginia, West Virginia and eastern Kentucky are unreasonably prejudicial against persons and localities in Virginia, West Virginia, and eastern Kentucky on the one hand, and unreasonably preferential of their competitors located in the eastern Ohio districts, on the other hand, in violation of sections 3 and 13 of the act. Nonprejudicial rates are sought for the future.

In No. 25590 it appears that the disposition of the issue [fol. 40] with respect to the reduced rates from points on the Pittsburgh & West Virginia in the Pittsburgh group in I. & S. No. 3833, and establishment of the relationship that should exist between persons and localities and between interstate and intrastate commerce in No. 25566 will likewise dispose of the cause of the complaint under sections 3 and 13 of the act.

It has already been shown that one of the principal markets for these complainants' coal is in northeastern Ohio, and that since the reductions in Ohio the shipments from Pennsylvania have been greatly retarded.

Complainants contend that the rates from the Pittsburgh, Freeport, and Connellsville districts to northeastern Ohio are unreasonable. A typical rate is that from the Pittsburgh district to Cleveland, average short tariff route 162 miles, $1.84 as set forth in Appendix A. As the Ohio Commission was guided to a great extent in their initial reductions by the scale of rates established from Indiana to Illinois over the short tariff routes in Coal Trade Assn. v.

Baltimore & O. R. Co., 185 I. C. C. 225, decided May 31, 1932, and termed the first Indiana-Illinois case, these complainants also contend that such a scale would be reasonable from the Pittsburgh and other Pennsylvania districts to Ohio destinations. The scale prescribed in the case cited was based to a great extent upon the findings in Intrastate Rates on Bituminous Coal in Illinois, 182 I. C. C. 537. One of the important issues in Coal Trade Assn. vs. Baltimore & O. R. Co., supra, was the establishment of joint rates over so-called tariff routes and upon reconsideration, 190 I. C. C. 743, termed the second Indiana-Illinois case, the method for figuring distances beyond 130 miles was revised and confined to the shortest route over which carload traffic can be moved without transfer of lading. In the second Indiana-Illinois case the scale was increased about 5 cents per ton to compensate for the method of calculating distances over the shortest routes. In the present case there is no issue of establishing tariff routes, and no necessity for determining the distances over the shortest routes over which traffic does not move for the purpose of measuring or comparing rates. Adequate evidence was introduced to show the average short tariff routes from the districts under consideration. The comparisons in the present case are made principally with the scale of rates in the first Indiana-Illinois case, as reconsideration of that case did not take place until during the pendency of the hearings in the present case. A rate of $1.65 was prescribed in that case over the short tariff route for distances of 180 miles and over 160 miles. Upon reconsideration of that case a rate of $1.70 was prescribed for the same distance but over the shortest route over which carload traffic can be moved without transfer of lading. Numerous comparisons with the scale prescribed in that case were introduced and have had our consideration. Discussion of the different influences in Illinois territory than to destination in Ohio appears elsewhere in this report.

As previously stated, in Youngstown Sheet & Tube Co. v. P. & L. E. R. R. Co., supra, decided February 3, 1914, we found a rate of 70 cents from the Pittsburgh district to Youngstown, 96.4 miles, not unreasonable. That rate, subjected to the general increases and reductions, has since become $1.34. The rate for this distance under the first Indiana-Illinois case would be $1.22 and under the second

case would be $1.27, or 5 cents higher. Cleveland has uniformly taken a differential of 50 cents over the rate to Youngstown on coal from the Pittsburgh district.

[fol. 41] Connellsville district takes 6 cents over Pittsburgh on coal traffic to most northeastern Ohio destinations. The rate from Connellsville to Cleveland, 216.4 miles, is $1.90 or only 5 cents greater than prescribed in the first Indiana-Illinois case.

The complainants undertake to measure the rates from Pittsburgh, for example, by the Holmes & Hallowell scale prescribed in Holmes & Hallowell Co. v. G. N. Ry. Co., 37 I. C. C. 627; 60 I. C. C. 687; 69 I. C. C. 11; 77 I. C. C. 683, hereinafter termed the H. & H. scale. That scale was prescribed for application on coal, from the head of the lakes to various points in the States of Minnesota, North Dakota and South Dakota. That scale for 162 miles, the distance from Pittsburgh district to Cleveland, is $1.97. The present rate of $1.84 from the Pittsburgh district to Cleveland is about 93.5 per cent of the H. & H. scale, and the rate from Connellsville district, a differential group, is $1.90 or 81.5 per cent of the H. & H. scale. Some of the differential groups in Ohio are now on as low a basis as 61 per cent of the H. & H. scale. The reduced rate of $1.45 from Ohio No. 8 to Cleveland, average short tariff route, 128.2 miles, is about 86.5 per cent of the H. & H. scale and the former rate, prior to August 1, 1932, was $1.74 or 102 per cent of the H. & H. scale. The present rates to Cleveland, for example, are the following percentages of the H. & H. scale; from Pomeroy district, 252.5 miles, $1.60, 61 per cent; from Hocking district, 199.3 miles, $1.60, 73 per cent; from Crooksville district, 170.9 miles, $1.47, 72 per cent; from Cambridge district, 176.1 miles, $1.45, 71 per cent; from Massillon district, 75 miles, $1.08, 84 per cent; from Middle-Coshocton district, 104 miles, $1.22, 80 per cent; and from Middle district, 92.6 miles, $1.22, 84 per cent.

The rates in Ohio, even before the reductions of August 1, 1932, and later dates, were, taking the territory as a whole, on a somewhat lower per cent of the H. & H. scale than the rates from the Pittsburgh or Connellsville districts to northeastern Ohio. Whenever comparisons are made between rates from differential groups with those from base groups or for short hauls where groups adjustments covering a

wide territory are considered, an anomalous rate adjustment appears from the measure of distance. Complainants rely in a measure upon such comparisons to show that the reduced rates in Ohio are not less than minimum rates. They compare the reduced rate of $1.45 from Ohio No. 8, the base group or nearby group, to Cleveland, 128.2 miles, with a rate of $1.42 from Connellsville district, a differential group, to Youngstown, 142 miles. Upon the same theory of comparison a rate of $1.89 from the Pomeroy district, a differential group, to Cleveland 252.5 miles, in effect prior to the reductions under consideration, can be shown to be substantially less than a minimum rate in comparison with a rate of $1.84 from Pittsburgh district, the base group, to Cleveland, 162 miles, tested by any distance measure. The former is 72.5 per cent of the H. & H. scale and the latter 93.5 per cent of the rates under that scale. A substantial volume of coal moved from Ohio No. 8 to Cleveland prior to the reduction in the rate from $1.74 to $1.45, but that movement is hardly comparable with the great volume that moves from Connellsville to Youngstown.

[fol. 42] The Holmes & Hallowell cases were the outgrowth of rate legislation in the State of Minnesota. The maladjustment between interstate and intrastate rates made its necessary to determine a common level of reasonable interstate and intrastate rates as a basis to remove the undue prejudice and preference there found to exist. We clearly indicated in that case that had we been concerned with the interstate rates alone justification might have been found for a higher basis than there prescribed and at the same time been within the flexible limits of judgment respecting reasonable rates. It was shown in that case that ideal transportation conditions prevailed from the head of the lakes to the Twin Cities. Coal reshipped from the head of the lakes originates in eastern fields, and prior to such reshipment has borne charges for rail-and-lake transportation. Difficult assembly service is shown in the present case. No such service is necessary in the reshipment of coal from the head of the lakes. That scale was constructed in the light of the special traffic, transportation, and other conditions there existing. Because of the dissimilarity of the conditions we can not accept the H. & H. scale as an appropriate yardstick by which to measure the rates here in issue. This same view

was expressed in the Eastern Bituminous Coal Investigation, 140 I. C. C. 3, and Bedford Pulp & Paper Co. v. Chesapeake & O. Ry. Co., 163 I. C. C. 670.

The Cleveland Chamber of Commerce, intervenor, also refers to the 70-cent rate from Pittsburgh district to Youngstown, found not unreasonable in Youngstown Sheet & Tube Co. v. P. & L. E. R. R. Co., supra, and points out that at that time the Middle-Coshocton-Massillon rate to Cleveland was also 70 cents. The average short tariff route in each instance is about the same, the former being 96.4 miles, and the latter 104 miles. This parity continued through the fifteen per cent increase in The Fifteen Per Cent Case, 45 I. C. C., 303, and until June 24, 1918, when both rates were 85 cents. Since that time and until the Ohio State reductions August 1, 1932, both of these rates were subjected to the same general changes but the application of different methods resulted in a rate of $1.34 from Pittsburgh to Youngstown and $1.54 from the Middle-Coshocton-Massillon district to Cleveland. As a rule the general changes in rates were applied on bituminous coal to the rates from the base groups and the differential relationships between mining groups were maintained to preserve the competitive conditions that existed prior to the changes. This principle we approved on bituminous coal in this territory. Increased Rates, 1920, 58 I. C. C. 220, 248. Intervener contends in substance, that the application of that principle has resulted in unreasonable rate- in the State of Ohio. To follow the principle of applying the same percentage increase or decrease to the rates from each group, advocated by this intervener, would destroy the competitive relationships between mining groups, and the application of any general change in rates would compel shippers to seek new markets for their coal. We can not subscribe to this theory on bituminous coal in this territory.

The Republic Steel Corporation, intervener, with plants located at Youngstown, Massillon, and Canton, and with mining interests in the Freeport district, contends that the rates from that district which are the same as from the Pittsburgh district to most destinations in northeastern Ohio, should be lower than those from the Pittsburgh district. Intervener has mines at Russellton, Pa. located on [fol. 43] the main line of the Bessemer & Lake Erie Rail-

road Company, 23.3 miles south of Butler, Pa., and 9.8 miles north of Unity Junction, which marks the southern boundary of the Freeport district on the Bessemer & Lake Erie. The coal mines from this district is said to be from the Freeport seam and not from the Pittsburgh seam. The coal produced in the Mercer-Butler coal rate group, which lies immediately north of the Freeport district, and from which the rates to northeastern Ohio destinations are lower than the rates from the Pittsburgh rate district, is also from the Freeport seam.

Intervener points out that the lake cargo coal rate from the Freeport district to Conneaut, Ohio, is 15 cents less than from the Pittsburgh group. To destinations on the New York, Chicago & St. Louis Railroad, rates published from the Freeport group on the Bessemer & Lake Erie are 10 cents less than from the Pittsburgh district, to Oak Point, Ohio, and other stations west thereof as far as Chicago. Oak Point is a few miles west of Lorain. To Ashtabula, Ohio, on the New York Central, which is north of the Youngstown destination group, the Freeport district rate is 15 cents under that from the Pittsburgh district, and to Andover, Ohio, on the same line the rate is 31 cents lower from the Freeport district than from Pittsburgh district. Certain other specific points of destination are selected on the Erie and the Chicago & Erie railroads to which there is a lower rate from the Freeport than from the Pittsburgh district.

It is argued that the Freeport district is a separate and distinct coal-producing district and should, to Youngstown, Canton and Massillon, be separated from the Pittsburgh district. Youngstown is the only important destination in northeastern Ohio to which the distance from the Freeport district is less than from the Pittsburgh district. To Cleveland, Lorain, Akron, and Painesville, Ohio, the distances from the Freeport district are the same or greater than the distances from the Pittsburgh district. To Youngstown, the average distance from the Freeport district is 83 miles, from the Pittsburgh district 96.4 miles.

Other testimony of the same general nature was introduced to establish the contentions of this intervener. This evidence can not be set forth in full in a report of this

nature. It is sufficient to say that consideration has been given the record on the question of separating the Freeport from the Pittsburgh district and we find that the evidence of record does not warrant such action.

Defendants who were also petitioning respondents in the thirteenth section proceedings insist that the interstate rates from western Pennsylvania and northern West Virginia are reasonable. They show rates from Pittsburgh district to Warren, 218.2 miles, $2.09, and to Oil City, Pa., 164.5 miles, $1.84; to Warren, from Reynoldsville district, 84.5 miles, $1.50, and from Fairmont district, 115.7 miles, $1.70; from Lawsonham district, 122.9 miles, $1.80, and from Aladdin district, 123.4 miles, $1.80. Eastbound rates from the Cumberland-Piedmont district are: to Hagerstown, Md., 137 miles, and to Waynesboro, Pa., 156 miles, [fol. 44] $2.08; to Union Bridge, Md., 179 miles, $2.20; from Reynoldsville district to Olean, U. Y., 86 miles, $1.90; and from Clearfield district to Elmira, N. Y., 203.9 miles, $2.31. These rates are generally representative of the coal rates prevailing in this territory and were either prescribed or approved by us. They also point out that the rates already instanced in support of the contention that the former Ohio intrastate rates were reasonably aligned with the rates in this general territory likewise support their contention that the present interstate rates from the territory under consideration to Ohio destinations are not unreasonable. These comparisons need not be repeated here.

In No. 25656, since the hearings began, H. W. Showalter, Receiver, Continental Coal Company, was substituted for one of the complainants, Continental Coal Company, in this particular complaint. Allegations under sections 1, 3, and 13 of the act are presented. Rates from points on the Monongahela Railway in northern West Virginia in the Fairmont district are 9 cents over the rate from the Connellsville district to Cleveland, for example. The mines of complainants are nearer the Pennsylvania State line than the other origins in the Fairmont group and it is contended that the rates to northeastern Ohio generally should not exceed the rates from Pittsburgh by more than the differential of 6 cents applicable from the Connellsville group. The rate to Youngstown, it is contended, should not exceed that from the Pittsburgh group by more than 8 cents. The

average short tariff route distance from the Fairmont district to Cleveland is 247 miles; from the Connellsville district, 216.4 miles; and from the Pittsburgh district, 162 miles.

More than 17 million tons of bituminous coal moved from points on the Monongahela Railway in each of the years 1927, 1928, and 1929. In 1930 over 15 million tons; in 1931 over 12 million tons; and during the first eleven months of 1932 about eight and one half million tons moved from the Monongahela. Most of this tonnage moved northbound to Ohio and other points beyond. One of the complainants shipped about 500,000 tons of coal to northeastern Ohio in 1930, and 400,000 tons in 1931. Over 95 per cent of the Monongahela's revenue is derived from coal traffic.

Evidence of record shows that coal from points on the Monongahela is marketed at destinations in northeastern Ohio, including Cleveland and many other principal consuming points in that territory, in competition with coal from eastern Ohio district as well as from Pittsburgh, Connellsville and other Crescent districts, and that since the reductions in the Ohio rates sales have been materially reduced and in some instances completely prevented.

[fol. 45] Under the adjustment existing prior to the Ohio reductions complainants were practically precluded by the high differentials from shipping coal to Canton and Massillon. The differentials from the Fairmont district were 33 cents over those from Ohio No. 8 district, now they have been increased to 51 cents. Cleveland and Akron were the principal destinations to which these complainants made shipments, but since the reductions in Ohio they are precluded from shipping to any point in northeastern Ohio unless they assume large losses incident to absorption in their mine prices of the increased differentials now existing.

Complainants figure the average short tariff route from that portion of the Fairmont district on the Monongahela Railway, from which the rates are assailed, to Cleveland, 234.7 miles; to Lorain, 250.9 miles; to Canton, 191.3 miles; and to Akron, 218.1 miles. The rate from the Fairmont district on the Monongahela Railway to the first two destinations is $1.99 and to the two others, $1.84 and $1.87, respectively.

The average short tariff route distance from active mines in the Pomeroy group to Cleveland is 252.4 miles, and the former rate, $1.89. From active mines in the Jackson district in Ohio to Cleveland the distance is 294.5 miles, and the rate also $1.89. Other similar examples are given with respect to Ohio rate districts but the most remote differential groups are selected for the purpose of comparison. Comparisons with the first Indiana-Illinois scale are also presented. It is contended that the relationship of the rates from northern West Virginia on the Monongahela Railway is unduly prejudicial against complainants' mines and unduly preferential of mines in the Pittsburgh and Connellsville groups.

In 1914 the Monongahela Railway was extended southward to Fairmont, W. Va., and mines on the new portion of the line were given the same rates as the portion in Pennsylvania, namely, the Connellsville basis. The Monongahela mines in West Virginia were continued as a part of the Connellsville group until August 30, 1917, when this parity was disturbed as the result of, but not required by, the order in Bituminous Coal to C. F. A. Territory, supra. Connellsville district, prior to this order, took 15 cents over Pittsburgh district to affected territory and Cleveland and Youngstown. That proceeding involved rates primarily to affected territory, west of northeastern Ohio territory here under consideration, but certain producers in the Connellsville group intervened in that case and specifically raised the issue of the relationship between the rates from their mines and mines in the Pittsburgh group to northeastern Ohio. No such issue was raised as to rates from points on the Monongahela in West Virginia. As the result of the presentation of the Connellsville group operators we found that the then existing differential of 15 cents, Connellsville over Pittsburgh, was unlawful, and that the differential should not exceed 6 cents to Cleveland and other points in northeastern Ohio east of the Sandusky-Galion line, except that to Youngstown and points taking the same rates the differential should not exceed 8 cents over Pittsburgh. Mines on the Monongahela were retained on the old basis of 15 cents over Pittsburgh, which was also the basis from mines on the Baltimore & Ohio in the Fairmont district groups south of the Monongahela. Complainants contend that the report in the case last cited

erroneously refers to the mines on the Monongahela in West Virginia as a part of the Fairmont group to affected territory. It is testified that at that time these mines were [fol. 46] a part of the Connellsville group both to affected territory and northeastern Ohio, and that the Fairmont groups on the Baltimore & Ohio took the same rates as the Pittsburgh group to affected territory, whereas the Connellsville group had rates 15 cents higher. Since the decision in the last mentioned case, all of these groups have been on a parity to affected territory. The report in that case indicates that the average distance, Connellsville district over Pittsburgh district, is 45 miles to Cleveland. The present case shows a difference of 54.4 miles between the average short tariff routes from Pittsburgh and from Connellsville districts to Cleveland. The average distance from the particular mines on the Monongahela which complainant contends should take lower rates than those applicable from the Fairmont group is 18.3 miles greater to Cleveland than the average distance from the Connellsville district to the same destination. The Monongahela mines take 9 cents over Connellsville to Cleveland, Lorain, and Akron, and 19 and 22 cents over Connellsville to Canton and Massillon, respectively. Distances from mines on the Baltimore & Ohio in the Connellsville district are compared with those from active mines on the Monongahela Railway in West Virginia, as follows:

To		From Baltimore & Ohio (Miles)	From Monongahela (Miles)
Cleveland	A	242.2	234.7
	B		242.8
Lorain	A	267.8	250.9
	B		259.9
Canton	A	227.2	191.3
	B		211.9
Akron	A	208.0	218.1
	B		223.5
Massillon	A	215.2	187.9
	B		205.9
Mansfield	A	286.6	258.5
	B		275.2

A—Short tariff route.
B—Average of short tariff routes of B. & O., P. & L. E. and P. R. R.

With the exception of the distances to Akron, the short tariff route distances and the average distance via the short routes of the three connecting lines with the Monon-

gahela are in every instance shorter than the short tariff route distances from mines on the Baltimore & Ohio in the Connellsville district. Of the 78 active mines in the Connellsville district in Pennsylvania, 32 are on the Baltimore & Ohio, 30 on the Monongahela, 14 on the Pennsylvania and 2 on the Pittsburgh & Lake Erie. Another comparison is made of the average short tariff route distances from points on the Monongahela Railway in Pennsylvania taking the Connellsville district rates with those from points on the same railway in West Virginia taking the Fairmont district rates, as follows:

[fol. 47]

To	From Monongahela Railway	
	Mines in Pennsylvania	Mines in West Virginia
Cleveland	225.6	242.8
Lorain	251.5	259.9
Canton	205.1	211.9
Akron	206.3	223.5
Massillon	201.4	205.9
Mansfield	270.5	275.2

The rates from points on the Monongahela in both Pennsylvania and West Virginia are on the Connellsville district basis northbound to Buffalo, N. Y., and other points in that area. Rates from complainants' mines to eastern destinations are on the same basis as those from the Connellsville district.

Other evidence is given indicating that the operating conditions are favorable from points on the Monongahela; that the operating costs of the Monongahela are relatively low; the decline in the production of coal by complainants; and certain other detailed evidence regarding the character of the coal mined on that line.

Defendants rely upon the same rate comparisons here as indicated in the discussion of No. 25590, to support their contention that the rates assailed in No. 25656 are not unlawful.

We are not satisfied at this time that the factor of distance should be given the weight urged by complainant, and this is especially true as it is shown that the largest mines on the Monongahela are on branch lines. The major question presented on this record is the relationship between State and interstate rates and the expeditious disposition of that issue is more vital to the majority of the parties in

this proceeding than the splitting of the Fairmont group. The latter issue will be reserved for further consideration.

In No. 25670 violations of sections 1, 3, and 13 are also alleged. Complainant's mines are also located in the Fairmont district and market their coal to a great extent in Ohio. The "Fairmont district" is not strictly a tariff designation and the description of the territory is not quite the same by all witnesses. In the present complaint it means the Fairmont No. 1, Monongah, Short Line, Opekiska, and Clarksburg districts on the Baltimore & Ohio Railroad; the Fairmont district on the Western Maryland Railway; and the districts on the Monongahela Railway, variously known as Fairmont No. 2, Group C, and Group No. 3, comprising parts of Monongalia, Marion, Harrison, and Taylor counties in northern West Virginia.

The restoration of the rate relationships between origin districts which existed prior to August 1, 1932, will substantially satisfy the complainant, provided the rates are not increased. The allegations under section 1 are not stressed, except that attention is directed to the fact that two of this complainant's mines are located on the Monongahela in northern West Virginia and in the same general territory as the mines of complainants in No. 25656.

[fol. 48] In 1931, Ohio mines furnished the destination territory under consideration 3,161,600 tons, or 34.6 per cent, and Fairmont, 1,058,366 tons or 11.6 per cent. The immediate effect of the rate reduction in Ohio is shown by the following table of the percentages of total coal movement to the principal destinations in northeastern Ohio for the first 7 months of 1932, combined, and for each of the remaining months after August 1, 1932, when the reductions took place:

1932 Months	From Ohio No. 8 Cambridge and Middle Districts Per cent	All Ohio Per cent	Fairmont Per cent
Jan.-July	34.5	34.0	13.1
August	30.7	31.1	10.5
September	41.2	42.1	7.5
October	43.8	45.5	8.1
November	53.9	55.7	7.0
December	55.6	57.2	7.7

Complainant ships approximately 10 per cent of its commercial shipments from the Fairmont district into north-

eastern Ohio and its witnesses testified in great detail as to the severe competition it is thus required to meet, particularly with producers mining coal in the Pittsburgh seam in the Pittsburgh and Ohio No. 8 districts, and to some extent in the Connellsville district.

Prior to August 1, 1932, the rates to Cleveland from the Fairmont district were 15 cents higher than from the Pittsburgh district, and 25 cents higher than from the Ohio No. 8 district. To Cleveland, the Fairmont rates are now 54 cents higher than from Ohio No. 8 district, and 44 cents higher than from mines on the Pittsburgh & West Virginia in the Pittsburgh group over that line in connection with the Wheeling & Lake Erie. This complainant, since the Ohio reductions, has been able to sell a diminished amount of coal in northeastern Ohio because of its grade of coal and efficient and modern methods of preparing its product.

Complainant's former differential over Ohio No. 8 was 25 cents, to which has now been added 29 cents, total 54 cents, or an increase of 116 per cent. Its witnesses testify that it is practically impossible to overcome at Cleveland, for example, the competitive burden that has been more than doubled. The interval between the increase in this differential and the first hearing in the present proceedings was too short to obtain accurate figures to show the full extent of lost business. Great sacrifices were made in a financial way to retain complainant's trade throughout September and October, 1932. Early in August, 1932, complainant estimated that on the original differential basis existing from the competitive groups its reasonable expectancy of contract business still to be secured, plus contract business already on its books, and on spot sales to be made during the period from August 1, 1932, to March 31, 1933, would be approximately 200,000 tons, or, roughly, from 20,000 to 30,000 tons per month for the 8 months' period. Despite its unusual efforts to retain its business it lost approximately 66,000 tons of this business to the middle of December, 1932, when the testimony was introduced. [fol. 49] This complainant's contract with a large tire and rubber company expired December 13, 1932. The contract was not renewed because of the reductions in Ohio. Other similar losses of business are shown. As previously stated, complainant is seeking the continuance of the differentials

that existed prior to August 1, 1932, between the Ohio No. 8 and the Fairmont district.

The Ohio commission reduced the rate to Cleveland, for example, to $1.47 from Crooksville, and $1.60 from Hocking and Pomeroy districts for distances, shown by one witness, of 171, 199 and 252 miles, respectively, whereas rates on the basis of the scale prescribed in the first Indiana-Illinois scale would result in rates of $1.65, $1.75 and $2.02, respectively. The prior rate was $1.89. It is contended that the differences between the rates from Ohio No. 8, Pittsburgh, Connellsville and Fairmont districts, as well as a part of the Cambridge district, and including the Moundsville district in the Panhandle of West Virginia, should be less rather than greater than they were prior to August 1, 1932, as they all mine coal from the same seam, the Pittsburgh seam. In great detail th evarious coal seams are described but it is deemed unnecessary to discuss the details of this testimony. Wisconsin & Arkansas Lumber Co. v. St. L., I. M. & S. Ry. Co., 33 I. C. C. 33, is cited to support the contention that the blanket system of rates rather than greater differentials should exist in cases of the nature here presented where coal is mined to a great extent from the same seam.

Defendants likewise rely upon their rate comparisons already discussed to support the contention that the rates here assailed are not unlawful.

The issue here presented with respect to the rates to be applied from the two mines on the Monongahela located in the same territory as those described in No. 25656, reserved for later consideration, will also be reserved for consideration with the rates in No. 25656.

In No. 25657, violations of sections 3 and 13 are alleged. This complainant's mines are located in Virginia, southern West Virginia, and eastern Kentucky, and to some extent in Tennessee. The districts are generally described as the Pocahontas, New River, Winding Gulf, Kanawha, Logan and Williamson (Kenova-Tracker). Most of the defendants admitted in their answers and contend in No. 25566 that there is a violation of section 13 as alleged by this complainant. The Wheeling, the Lorain & West Virginia and Akron, Canton & Youngstown deny the allegations of this complaint. Complainant contends that since the portion of the territory of destination served by the latter carriers

is a minor portion of the territory involved, the burden cast upon it to establish its contentions is comparatively light.

The rates generally from the districts under consideration to Cleveland and many of the other destinations in northeastern Ohio are $2.39 and $2.64. The Kanawha district, for example, takes a differential of 50 cents over the Hocking district. It is pointed out that that differential has now been increased by 29 cents. Hocking district takes 15 cents over Ohio No. 8 to Cleveland for a greater distance of about 100 miles, while the Kanawha district to the same destination is now required to pay 79 cents over Hocking for a greater distance of about 100 miles. If distance were the rule of thumb to measure differentials it is apparent that either the 15-cent or 79-cent differential is unwarranted. The influences leading to this disparity are not appar- [fol. 50] ent on the record. Mileage has always been disregarded to a very great extent in making coal rates from the Appalachian field. See also Lake Cargo Coal Rates, 46 I. C. C. 159, 188; Ohio-Michigan Coal Cases, supra.

Tables showing the reduction in shipments from complainant's mines to the principal destinations in Ohio are shown in great detail for the last few years. The coal that displaced that from complainant's mines originated in Ohio No. 8 and Hocking districts. Even before the 29 cent reduction in the rates in Ohio complainant's operators began to lose business, because of a rumor that a reduction was contemplated, and it is testified that the additional handicap of 29 cents will prevent many of these origin points from selling any coal in the destination territory in northeastern Ohio. It is true that part of the loss of business has been caused by the depression and the desire of consumers to use coal costing the least money, yet these causes have been accentuated further by the reduction of rates in Ohio. The Williamson field in the last year or so has lost 35 per cent of its tonnage; 57 per cent in northern Ohio generally, and 84 per cent to the five destinations in northeastern Ohio to which the rates were reduced from eastern Ohio districts. Dealers in Ohio testify that formerly West Virginia coal was handled but Ohio coal has now been substituted because of the lower delivered price. Coal from points on the Norfolk & Western declined during the first ten months of 1932, 58.4 per cent to Cleveland; 91.6 per cent to Canton; 84.2 per cent to Lorain; and 89.6 per

cent to Massillon. This is virtual exclusion from these markets. Testimony indicates that the very large percentage of coal that moves to Canton and Massillon from interstate districts is special-purpose coal, consisting of high-volatile and low volatile coking coals and of gas coal. Only a relatively small volume of the interstate shipments consists of steam and domestic coal. It is indicated elsewhere in this report that steam and domestic coal moved from the Pittsburgh district to both Canton and Massillon in 1929, 1930, and 1931. Most of the latter coal moves from the Ohio mines to these destinations as the rates are relatively lower than from the inner and outer Crescents. The intensity of the competition, is not determined by the actual volume of movement. The record contains testimony of numerous retail dealers that they have lost business since the reductions in the Ohio rates. This testimony has been carefully considered but it is deemed that to narrate further testimony of this nature would be merely cumulative.

Effect of Reduced Rates on Carriers' Revenues

Operating revenue and expense data are set forth to demonstrate the need of carriers in the eastern district for additional revenue and the further shrinkage of revenues that will result if interstate rates on coal are reduced to the level of the Ohio intrastate rates. Operating revenues in the eastern district reached their peak in 1926, when all Class I carriers, including the Pocahontas lines, earned 5.52 per cent on their book investment, plus net additions and betterments. If the Pocahontas lines are excluded from the computations the earnings were 5.16 per cent. There was a steady decline in the rate of return in 1927 and 1928, a slight improvement in 1929, and a very marked decline each year thereafter. The earnings for 1931 were 2.24 per cent if the Pocahontas lines are included; 1.89 per cent if they are excluded. The Pocahontas lines, as a group, earned 8.5 per cent in 1929, 6.80 per cent in 1930, and 5.36 per cent in 1931.

[fol. 51] The operating ratio was lowest in 1929 when, for all carriers in the eastern district, 20.3 per cent of the total operating revenues were available for fixed charges, dividends, and surplus. If the Pocahontas lines are excluded from the list of carriers, 19 per cent of the total operating

revenues were available for these purposes. For the first nine months of 1932 this percentage had dropped to 12 and 9.9 per cent, respectively. The lines in the eastern district as a whole earned their fixed charges 2.52 times in 1929, and only 1.26 times in 1931. For the first nine months of 1932, there was a deficit of $25,720,000 under fixed charges. Forty-three out of a total of 68 Class I roads in the eastern district operated at a loss for this period.

The aggregate deficit of the 43 lines was $68,443,416 and the aggregate deficit of 8 roads affected by the reduced rates on coal was $29,598,000, or approximately 42 per cent of the total. Only one line, the Pennsylvania, among those affected by the reduced rates on coal had a surplus after payment of fixed charges, and this surplus was only slightly greater than the revenue accruing to it under the emergency charges recently authorized for a temporary period. The deficit of the Baltimore and Ohio for the first nine months of 1932 was $5,837,202. The reduced intrastate rates based on its intrastate coal tonnage to the principal consuming points in Ohio in 1931, would result in a reduction of $226,000 in the revenues of this line.

The principal coal-carrying roads have estimated the reduction in revenues that will result if the interstate rates from mines in Pennsylvania, Virginia, and West Virginia to Cleveland, Lorain, Akron, Canton, Massillon, Alliance, and other important consuming points in northeastern Ohio are reduced by the same amounts as applied to the intrastate rates. The reduction on the Pennsylvania would be $948,447 if based on 1929 tonnage, and $516,400 if based on 1931 tonnage. The estimated reduction in revenue for other lines based on 1931 tonnage is as follows: New York Central, $202,666; Pittsburgh & Lake Erie, including tonnage received by it from the Monongahela, the Montour, the Pittsburgh, Chartiers & Youghiogheny, and the Pittsburgh & West Virginia in Pennsylvania, $331,375; and Baltimore and Ohio, $215,000. The Norfolk & Western estimates a reduction in revenue of about $500,000 based on its 1929 tonnage.

If a corresponding reduction were made in the interstate rates to all destinations in central territory, it would result in a loss of revenue based on 1931 tonnage of $3,434,745 for the Pennsylvania, $1,271,291 for the New York Central, and $1,938,044 for the Pittsburgh & Lake Erie. Coal tonnage

constituted 55.3 per cent of the total freight tonnage of the latter line in 1931. The effect that a reduction in interstate rates on coal to Ohio will have on the revenues of other lines is not shown in specific amounts but there is a substantial volume of coal destined to Ohio which is originated on or carried by the Pocahontas lines and by such lines as the Montour, and Monongahela, and the Pittsburgh & West Virginia, which derive the greater portion of their revenue from coal traffic. Far greater losses would result if the reductions were reflected to related territories and this greater estimated loss on account of maintaining existing relationship of rates has been discussed in the early part of this report.

[fol. 52] Mines on the Chesapeake & Ohio in West Virginia and Kentucky in 1931 produced 42,967,949 tons of coal of which about 75 per cent moved westbound to destinations in Ohio and beyond. Mines on this road in Ohio in 1931 produced 958,560 tons of coal which was marketed principally in Ohio, southern Michigan, and northern Indiana. Coal traffic is accountable for approximately 60 per cent of tonnage and revenue of the Pittsburgh & West Virginia, and that line had an operating deficit of $415,113 for the first 11 months of 1932. The reduction in intrastate rates by the Wheeling on August 1, 1932, as previously shown, increased the differential between mines in Ohio No. 8 Group on that line and mines in the Pittsburgh district on the Pittsburgh & West Virginia from 10 cents to 39 cents. Four mines on the Pittsburgh & West Virginia in the Pittsburgh district shipped 7,286 tons to Cleveland in July and only 1,141 tons and 1,234 tons in August and September, respectively. The 10-cent differential was restored by a reduction in the rates from the Pittsburgh group on October 5, 1932, and these four mines shipped 10,908 tons and 15,239 tons to Cleveland in October and November, respectively.

Summary

The rate adjustment in the territory under consideration is the result of carrier and commercial competition over a long period of years together with the demands of consumers for particular grades of coal, and in some instances decisions of this commission. Mining properties outside the State of Ohio have been located and developed with heavy investments in facilities under the rate relationships exist-

ing prior to the reductions in the State of Ohio, and these properties are now being financially and physically seriously affected. One of the complainants has become bankrupt since the filing of its complaint, and others are on the verge of disaster. The use of substitute fuels adds to the coal producer's difficulty while substituted modes of transportation are reducing the revenues of the railroads. Not only is the truck being used to affect the railroads' revenues adversely but the barge lines in the very territory here under consideration are displacing much railroad tonnage by use of the waterways. The volume of coal trucked for short distances in the mining districts of Ohio is shown in a few instances. Apparently this form of competition is increasing as good roads are being built. Petitioners in the present proceeding do not contend that the competition of trucks is so great as to justify the reduced rail rates in Ohio. The record fully establishes that coal has moved freely between Ohio points prior to the reduction in rates in northeastern Ohio. This is significant. We are asked to prescribe reasonable rates from the Pittsburgh and certain other groups to northeastern Ohio as well as to remove undue prejudice against interstate coal producers and unjust discrimination against interstate commerce. Under the circumstances here presented such rates should be determined with great regard for the value of the service to the shipper and the existing competitive conditions. Distance has never been made the sole measure of these rates. If such a measure were to govern the farther distant groups would be unable to compete and the present relationships would be disrupted. These relationships, in general, have been in existence for many years, and counsel assert, even before this commission was organized.

[fol. 53] Any change in the rates from these origin groups would disturb the adjustment involved in this proceeding. While the rates only to northeastern Ohio are assailed, yet any finding as to that territory would reflect itself immediately to the territory beyond, possibly altering the adjustment as far as Chicago.

Appendix B clearly indicates that in normal times coal moves freely from the inner and outer crescent districts to northeastern Ohio in substantial volume, and indeed, under abnormal conditions a very substantial movement of coal from these origins moved to Cleveland and other destina-

tions in the same territory prior to the reduction in the Ohio rates. The interstate rates assailed as unreasonable prior to the Ohio reductions, did not prevent a substantial movement of coal to these Ohio destinations greatly in competition with Ohio mines. Under such circumstances and in view of the closely woven relationships of these rates under which the industry in this territory has been fostered, and particularly the present economic condition which also has affected the railroads adversely, only the most convincing evidence would warrant the disruption of the long existing relationship of rates or the reduction of the interstate rates. That convincing proof does not appear on the present record.

Petitioning respondents submit that if the Ohio reductions remain in effect it will be necessary to resort to reductions from interstate districts to maintain the long established relationships. The record fully establishes that the Ohio reductions constitute a real discrimination against and obstruction to interstate commerce, and this is especially true under the present economic condition as lower grade coal for domestic and steam purposes than previously was obtained from interstate districts is being obtained from the Ohio districts since the reductions in rates in Ohio.

Findings

The record definitely establishes that coal from Pennsylvania, West Virginia, and Ohio mines is highly competitive at Cleveland and other destinations in northeastern Ohio to which the assailed rates apply and that there is a substantial movement of the coal from those points to such destinations. It further appears that the movement of such coal from the Ohio points or groups and to the Ohio territory outlined in Appendix D is at intrastate rates which are generally substantially lower, distance considered, than are the reasonable interstate rates, herein approved, under which such coal is moved to the same destinations from Pennsylvania and West Virginia; that this disparity in rates is greater than is warranted by the differences in transportation conditions from the Ohio mines, on the one hand, and the Pennsylvania and West Virginia mines, on the other; that the Ohio intrastate traffic under these assailed rates is not contributing its just proportion to the revenues of the carriers, and by reason of that fact

respondents are suffering substantial losses in their revenues to which they are justly entitled.

We find that the rates assailed from the Pittsburgh, Freeport, Connellsville, and Fairmont districts to destinations in northeastern Ohio are reasonable, except that the measure of the rates from points on the Monongahela Railway in northern West Virginia, and their relation to the rates from the Pittsburgh and Connellsville districts will be reserved for further consideration.

[fol. 54] We further find that the intrastate rates here in issue from eastern Ohio districts to the destinations in northeastern Ohio as defined in this report, are and for the future will be unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers of bituminous coal from the rate districts as hereinbefore defined in Pennsylvania and West Virginia to the same destinations in Ohio.

We further find that from the points or groups and to the territory outlined in Appendix D to this report the assailed Ohio intrastate rates result and will result in undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 of the act.

Such undue preference and prejudice and unjust discrimination should be removed by the establishment and maintenance of intrastate rates from the points or groups and to the destination territory from and to which the assailed intrastate rates apply which are no lower than the specific rates or rates on the basis set forth in Appendix D.

We further find in I. & S. 3801 that the reduced rates from the Pittsburgh group on the Pittsburgh & West Virginia to destinations in northeastern Ohio here under investigation have not been justified except to the extent that they may not be less than the present rates from the remainder of the Pittsburgh group to the same destinations, herein found not unreasonable. These rates should be promptly canceled and rates established from and to these points on a basis not less than those applicable from the remainder of the Pittsburgh group to the same destinations.

We further find in I. & S. 3833 that the proposed rates from the Pittsburgh group on the Pittsburgh & West Virginia to Ohio destinations here under consideration have been justified. This order of suspension will be vacated, and the proceedings in I. & S. 3801 and 3833 discontinued.

Undue prejudice against complainants and under preference of Ohio operators exists in connection with the rates on bituminous coal to destinations in northeastern Ohio. It is not deemed necessary to name the individual destination points, other than those specifically mentioned, which cover the entire portion of the State under consideration as the disposition of the issues in No. 25566, we believe, adequately disposes of the issues raised in this connection under sections 3 and 13 of all of the complainants to the extent justified on the evidence presented, except that the measure of the rates in Nos. 25656 and 25670 from points on the Monongahela Railway in northern West Virginia and their relationship to the rates from the Pittsburgh and Connellsville districts, will be reserved for further consideration.

Appropriate orders in accordance with the findings herein will be entered.

[fol. 55] TATE, Commissioner, concurring in part:

I concur in the report and the order of the majority in this case, except that portion which would compel the addition of the emergency surcharges within the State of Ohio in the event the carriers apply the said surcharges on their interstate movements. Without lengthening this expression, I simply refer to the reasons given in my dissenting-in-part expression in *Increases in Intrastate Freight Rates*, 186 I. C. C. 615.

EASTMAN, Commissioner, dissenting:

I am not persuaded by the evidence that the Ohio intrastate rates in issue are below a maximum reasonable level or that the interstate rates in issue which are on a higher relative level, distance and other pertinent transportations conditions considered, ought not to be reduced. At the present time the coal industry, like the railroad industry, is in serious financial straits; and in both instances the effects of the general economic depression are aggravated by rapidly increasing competition from outside sources, from other transportation agencies in the case of the railroads and from other heat or power producing agencies in the case of the coal mines. An outstanding difference is that reductions have been avoided to a much greater extent in the case of the freight rates on coal than in the

case of the mine prices for coal. The dislocation thus created is under consideration in the general freight rate investigation in No. 16000, and I agree that it ought not to enter in any controlling way into our consideration of the issues in this proceeding. However, I think that it may properly influence us to the extent, at least, of not resolving doubts against the reduced rates.

As I read the report of the majority, it resolves most doubts very definitely against the reduced rates. Let me illustrate this:

1. Rate Comparisons. It is clear that the reduced rates, measured by the rates which we ourselves have prescribed in Indiana-Illinois territory, are in general not below a maximum reasonable level. This measure, however, is rejected as unreliable, for two reasons, as I understand them: First, because of the highly competitive conditions which prevail in Indiana-Illinois territory and the alleged fact that we prescribed rates there "with primary regard for competition"; and second, because it is not shown that transportation conditions in Ohio and the adjacent portion of Pennsylvania are similar to those in the Indiana-Illinois territory.

I submit that we prescribed these rates in Indiana-Illinois territory in terms as maximum reasonable rates which could not be exceeded; that if we prescribed such rates with "primary regard for competition", we were derelict in our duty under the law; and that there is nothing in the reports in question which justifies the conclusion that we erred in this way. It is true that we found that the rates to Chicago were depressed, but it is not the rates to Chicago which are here offered for comparative purposes but the rates which we prescribed, in many instances as reductions, for application to numerous smaller destinations throughout Indiana and Illinois where conditions bear little resemblance to those which exist at Chicago. Moreover, there is no valid basis for the conclusion that competitive conditions are less intense in Indiana-Illinois territory than in northeastern Ohio. The facts stated at length in the majority report itself are proof positive to [fol. 56] the contrary.

Ohio, Indiana and Illinois are all included in the territory west of the Alleghenies, north of the Ohio River, and east of the Mississippi River in which we have many times pre-

scribed rates on a uniform level. As an illustration of our findings in this respect, Jones & Laughlin Steel Corp. v. B. & O. R. R. Co., 96 I. C. C. 682, 691, may be cited, where we said:

> As between Illinois and the territory east thereof, there are in general no differences in transportation conditions which would warrant material differences in rates.

Here, elaborate evidence was submitted purporting to show that transportation conditions in the movement of coal are no less favorable in Indiana-Illinois territory than in northeastern Ohio.

This evidence is dismissed from consideration by the majority in part because of "twenty-one *alleged* categories of errors". There is, however, no proof that transportation conditions are more burdensome in Ohio. On the contrary, traffic executives of the Pennsylvania and the Baltimore & Ohio testified that a normal level of coal rates in Indiana and Illinois would be a fair measure for Ohio. The majority, however, go so far as to cast doubt on previous conclusions that rates should in general be on a uniform level in Illinois and territory east thereof, by mentioning rates which are lower in Illinois, and converting this fact into a "principle" said to be supported in certain cited cases, none of which, so far as I can determine, in fact supports any such "principle". A further example of this supposed "principle" is said to be sand and gravel rates, although all that we have done with respect to those rates, as I understand it, is to approve a so-called group and differential adjustment in Illinois, instead of the mileage adjustment which prevails in the remainder of central territory, but without intent to approve any lower average level in Illinois.

In discrediting rate comparisons which are favorable to the Ohio rates, the majority also dismiss the Holmes & Hallowell scale from consideration, although we have repeatedly used it as a convenient means of testing the relative level of coal rates, and include in this dismissal an exaggerated description of the favorable transportation conditions in the territory where this scale is applied. They also see fit to cast doubt on certain ex-river coal rates which we have prescribed in this territory, although these cases have not been reopened and are not here before us.

In contrast with this treatment of rate comparisons which are favorable to the Ohio rates, the majority find no

difficulty in accepting comparisons which are unfavorable and many of which are drawn from eastern districts where we have repeatedly found the transportation conditions surrounding the movement of coal to be more burdensome than in the central territory districts west of the Alleghenies. In fact, citations of such cases in these eastern districts are followed by a statement that the record is replete with "comparisons of this nature" which indicate that the former rates in Ohio were not higher than rates "in the same general territory."

2. The Cost Study. An elaborate cost study was submitted by the Wheeling to show that the reduced rates produce large earnings, not over out-of-pocket costs merely, but over a full allocation of operating expenses including the deficit incurred in passenger operations. [fol. 57] In concluding that this study is not entitled to weight, the majority seem to me to accept at face value many of the criticisms of the opposing carriers without any careful anaylsis of the answers to these criticisms which were offered by the Wheeling. Nor is any attempt made to arrive at a corrected result after making allowance for criticisms found upon thorough analysis to be valid, although the margin of earnings shown by the Wheeling is ample enough to absorb substantial corrections without vitiating the conclusion that the reduced rates are profitable. It is significant, also, that no countervailing cost studies were submitted by the opposing carriers.

3. The effect of Preserving Differentials. As a result of preserving preexisting rate differentials in connection with the general rate increases the rates for the short hauls within Ohio have been increased by much larger percentages than the competitive rates for the longer hauls from the more remote districts. An illustration is the Middle-Coshocton-Massillon rate to Cleveland, which for many years was the same as the rate from the Pittsburgh district to Youngstown. The former was increased from 70 cents to $1.54, or 120 per cent, whereas the latter was increased from 70 cents to $1.34, or 91.4 per cent. Both were increased a materially greater percentage than many of the long-haul rates. The majority now require the Cleveland rate to be restored to $1.54, and support this conclusion by stating that we approved the principle of preserving differentials in Increased Rates, 1920, 58 I. C. C. 220, and

that any other principle would "destroy the competitive relationships between mining groups." The following statement from Lake Cargo Coal Rates, 1925, 126 I. C. C. 309, 363, has apparently been forgotten:

> Our previous findings were also based in part upon the fact that the rates assailed resulted from those prescribed in 1912, with only the subsequent general increases and reductions, and the differentials are the same as those prescribed in 1917. It cannot be denied, however, that the increases have been proportionately greater in the rates from the complaining districts than in those from the southern districts, and in fact proportionately greater than in the class and commodity rates generally in the same territory. It is true that we approved the manner of increasing these rates, and we have held that such increases were not proof that the resulting rates were unreasonable, but this does not prevent us from according relief from rates so increased where the facts otherwise justify it, and we did accord relief from rates approved in 1917 and later modified only by the general increases and reduction in the Ohio-Michigan Coal Cases. The present record shows clearly that the circumstances and conditions now existing are materially different from those existing at the time of the decision in the Boileau case in 1912 and the Lake Cargo Coal Case of 1917.
>
> Relief was accorded in the case of these lake-cargo rates by reducing the rates for the shorter hauls 20 cents per ton.
>
> Summing up the matter, my judgment is that the majority have given altogether insufficient weight to the evidence which is favorable to the Ohio rates and have accorded too much weight to the opposing evidence. I cannot, therefore, accept the conclusions which have been reached. My impression, gained wholly from the report, is that the majority have been influenced, very naturally but I think unduly, by the alarming estimates of revenue [fol. 58] reductions which it is feared will ultimately follow if these Ohio rates are not restored to their former levels. In my opinion it is by no means certain that all of these reductions would be necessary, but the more important consideration is that it is even less certain, in view of the conditions now surrounding the coal industry, that it is to the advantage of the carriers themselves to maintain all of their coal rates at the levels which have hitherto prevailed.

[fol. 59]

APPENDIX A

Docket No. 25566

From

Ohio No. 8 District

To	Number of active mines	Total average miles	Average miles short tariff route	Rate in cents per net ton	
				Former	Present
Cleveland, Ohio	55	7,049.8	128.2	174	145
Lorain, "	55	7,614.8	138.5	174	145
Huron, "	55	8,721.2	158.6	174	155
Canton, "	55	3,936.4	71.6	126	108
Massillon, "	55	4,217.6	76.7	126	108
Akron, "	55	5,306.6	96.5	151	128
Mansfield, "	55	8,511.5	154.8	178	178
Middle District					
Cleveland, Ohio	13	1,203.6	92.6	154	122
Lorain, "	13	1,402.0	107.8	154	128
Huron, "	13	1,597.9	122.9	164	134
Canton, "	13	441.0	33.9	76	60
Massillon, "	13	527.4	40.6	101	80
Akron, "	13	747.6	57.5	126	101
Mansfield, "	13	1,646.6	142.0	163	163
Middle-Coshocton District					
Cleveland, Ohio	25	3,877.8	104.0	154	122
Lorain, "	25	2,400.8	76.0	154	128
Huron, "	25	3,730.6	149.2	164	134
Canton, "	25	914.0	36.6	76	60
Massillon, "	25	1,416.2	38.3	101	80
Akron, "	25	2,809.0	75.9	126	101
Mansfield, "	25	4,003.8	108.2	163	163
Massillon District					
Cleveland, Ohio	1	75.4	75.4	134	108
Lorain, "	1	74.0	74.0	154	108
Huron, "	1	91.0	91.0	159	115
Canton, "	1	18.0	18.0	101	72
Massillon, "	1	11.0	11.0	64	60
Akron, "	1	41.4	41.4	126	87
Mansfield, "	1	71.0	71.0	153	153
[fol. 60] **Cambridge District**					
Cleveland, Ohio	12	2,112.7	176.1	174	145
Lorain, "	12	2,018.9	168.2	174	145
Huron, "	12	2,424.6	202.1	174	155
Canton, "	12	1,197.3	99.8	126	126
Massillon, "	12	1,510.7	125.9	126	126
Akron, "	12	1,540.6	128.4	151	128
Mansfield, "	12	1,443.3	120.3	176	151
Crooksville District					
Cleveland, Ohio	17	2,905.3	170.9	176	147
Lorain, "	17	3,569.8	210.0	176	147
Huron, "	17	3,202.2	188.4	176	157
Canton, "	17	2,056.9	128.6	126	122
Massillon, "	17	1,941.3	121.3	126	108
Akron, "	17	2,535.4	149.1	151	128
Mansfield, "	17	1,732.0	101.9	151	151

APPENDIX A

Docket No. 25566

To	Number of active mines	Total average miles	Average miles short tariff route	Rate in cents per net ton	
				Former	Present
Hocking District					
Cleveland, Ohio	41	8,171.8	199.3	189	160
Lorain, "	41	9,352.0	228.1	189	160
Huron, "	41	10,389.7	253.4	189	170
Canton, "	41	6,855.8	167.4	189	189
Massillon "	41	6,546.8	159.7	189	189
Akron, "	41	7,420.9	181.0	189	160
Mansfield, "	41	5,608.3	136.8	151	151
Pomeroy District					
Cleveland, Ohio	9	2,272.2	252.5	189	160
Lorain, "	9	2,508.7	278.7	189	189
Huron, "	9	2,766.7	307.4	189	170
Canton, "	9	2,303.8	256.0	189	189
Massillon, "	5	1,267.2	253.6	189	189
Akron, "	9	2,273.8	252.6	189	160
Mansfield, "	9	1,728.7	192.1	189	189

[fol. 61] I. & S. Docket Nos. 3801 and 3833

Docket No. 25590

From

Pittsburgh District

To	Number of active mines	Total average miles	Average miles short tariff route	Rate in cents per net ton.
Cleveland, Ohio	144	23,330.6	162.0	184[1]
Lorain, "	144	24,420.3	169.6	184[1]
Huron, "	61	10,093.3	165.5	216[1]
Canton, "	143	18,534.4	129.6	159[1]
Massillon, "	143	18,515.9	129.5	159[1]
Akron, "	144	20,785.4	144.3	172
Mansfield, "	151	30,402.8	201.3	203

Via P. & W. V. Ry. 1 $1.55; 2 $1.65.

Freeport District				
Cleveland, Ohio	8	1,303.0	162.9	184
Lorain, "	8	1,620.6	202.6	184
Huron, "	8	1,833.4	229.2	216
Canton, "	...	.....	.....	...
Massillon, "	...	.....	.....	...
Akron, "	8	1,100.8	137.6	172
Mansfield, "	8	1,734.4	216.8	203
Connellsville District				
Cleveland, Ohio	78	16,876.6	216.4	190
Lorain, "	78	18,818.0	241.3	190
Huron, "	60	16,400.0	273.3	222
Canton, "	78	14,862.6	190.5	165
Massillon, "	78	14,894.7	191.0	165
Akron, "	78	15,296.6	196.1	178
Mansfield, "	78	17,994.4	230.7	209

[fol. 62]

Docket No. 25657

(1) High Volatile Coal.
(2) Low Volatile Coal.

From,
(1) Kanawha District

To	Number of active mines	Total average miles	Average miles short tariff route	Rate in cents per net ton
Cleveland, Ohio	149	52,716.5	353.8	239
Lorain, "	149	56,008.9	375.9	239
Huron, "	149	60,304.4	404.7	239
Canton, "	149	50,176.5	336.8	239
Massillon, "	149	49,108.2	329.6	239
Akron, "	149	52,073.1	349.5	239
Mansfield, "	149	44,088.6	295.9	239
(1) Kenova District				
Cleveland, Ohio	16	5,449	340.6	239
Lorain, "	16	5,394.6	337.3	239
Huron, "	16	5,164.2	322.8	239
Canton, "	16	5,145	321.6	239
Massillon, "	16	5,113	319.6	239
Akron, "	16	5,353	334.6	239
Mansfield, "	16	4,418.6	276.2	239
(1) Thacker District				
Cleveland, Ohio	42	15,291	364.1	239
Lorain, "	42	15,148.2	360.7	239
Huron, "	42	14,543.4	346.3	239
Canton, "	42	14,493	345.1	239
Massillon, "	42	14,409	343.1	239
Akron, "	42	15,387.6	366.4	239
Mansfield, "	42	12,586.2	299.7	239
(2) New River District (C. & O. Ry., N. Y. C. R. R.)				
Cleveland, Ohio	116	47,475.3	409.3	264
Lorain, "	116	49,997.7	431.0	264
Huron, "	116	53,231.8	458.9	264
Canton, "	116	46,079.3	397.2	264
Massillon, "	116	45,160.3	389.3	264
Akron, "	116	47,012.4	405.3	264
Mansfield, "	116	40,861.7	352.3	264
(2) New River and Pocahontas District (Vgn. Ry.)				
Cleveland, Ohio	183	80,345.9	439.0	264
Lorain, "	183	84,018.5	459.1	264
Huron, "	183	85,852.3	469.1	264
Canton, "	183	74,296.9	406.0	264
Massillon, "	183	73,308.9	400.6	264
Akron, "	183	81,164.5	443.5	264
Mansfield, "	183	68,819.5	376.1	264

[fol. 63]

(2) Pocahontas District (N. & W. Ry.)

Cleveland, Ohio	62	26,959.0	434.8	264
Lorain, "	62	26,748.2	431.4	264
Huron, "	62	25,855.4	417.0	264
Canton, "	62	25,781.0	415.8	264
Massillon, "	62	25,657.0	413.8	264
Akron, "	62	26,587.0	428.8	264
Mansfield, "	62	22,966.2	370.4	264

(2) Tug River District (N. & W. Ry.)

Cleveland, Ohio	31	12,713.1	410.1	264
Lorain, "	31	12,607.6	406.7	264
Huron, "	31	12,161.2	392.3	264
Canton, "	31	12,124.0	391.1	264
Massillon, "	31	12,062.0	389.1	264
Akron, "	31	12,527.0	404.1	264
Mansfield, "	31	10,716.6	345.7	264

Docket No. 25670
From
Fairmont District

Cleveland, Ohio	117	28,902.8	247.0	199
Lorain, "	117	29,675.3	253.6	199
Huron, "	117	32,242.7	275.6	216
Canton, "	117	22,880.7	195.6	182
Massillon, "	117	22,300.5	190.6	165
Akron, "	117	25,733.4	219.9	182
Mansfield, "	117	30,596.9	261.5	203

Docket No. 26656
From
Monongahela Ry. in W. Va.

Cleveland, Ohio	...	.....	234.7	199
Lorain, "	...	.....	250.9	199
Canton, "	...	.....	204.4	184
Massillon, "	...	.....	187.9	187
Akron, "	...	.....	218.1	187
Mansfield, "	...	.....	258.5	213

APPENDIX B

Volume of bituminous coal in net tons of 2000 pounds

To	Year	From Ohio No. 8	Middle	Massillon	Cambridge	Pittsburgh	Connellsville	Fairmont	Kanawha	Kenova	Thacker
Cleveland	1922	1,641,785	443,525	.....	167,346	534,186	388,850	199,397	.....	.....	.....
	1923	2,252,325	526,143	.....	143,047	1,056,566	538,285	150,856	.....	.....	.....
	1924	2,165,866	431,256	.....	95,250	662,971	958,423	189,116	.....	.....	.....
	1925	2,299,079	510,760	.....	73,067	871,690	585,004	310,862	556,857	20,094	20,985
	1926	2,166,683	305,843	12,004	75,243	1,076,885	540,514	365,424	843,226	17,633	24,078
	1927	1,204,882	134,312	6,252	53,210	862,877	993,562	824,349	761,859	24,662	46,219
	1928	861,526	86,445	4,301	12,078	1,406,262	1,164,850	1,111,512	389,600	19,520	40,220
	1929	1,007,993	197,590	5,530	65,089	1,417,890	1,009,789	1,297,366	292,780	13,654	12,529
	1930	908,802	258,030	5,129	74,207	1,492,471	567,049	1,192,105	217,700	4,377	14,848
	1931	792,483	310,501	4,208	77,442	1,290,895	410,408	841,925	137,691	3,288	17,054
	1932*	273,795	172,171	.....	29,082	589,370	175,077	328,261	33,542	695	13,385
Lorain	1922	395,767	32,766	.....	2,631	315,731	412,986	10,429	.....	.....	.....
	1923	452,010	31,776	.....	18,402	416,324	984,888	44,655	.....	.....	.....
So. Lorain	1924	441,128	34,614	.....	5,662	341,526	734,902	5,019	.....	.....	.....
	1925	547,050	29,138	.....	2,381	234,108	895,452	2,072	116,063	4,640	23,980
	1926	433,276	14,498	49	2,762	247,927	1,187,024	9,521	94,821	3,207	18,940
	1927	269,362	8,160	112	2,079	228,137	930,250	48,388	84,811	4,050	19,021
	1928	199,267	7,830	250	1,120	447,355	1,095,461	18,847	81,786	2,830	13,933
	1929	94,270	13,273	130	2,392	331,481	1,381,229	14,570	83,368	2,198	10,766
	1930	60,440	13,556	50	2,632	342,769	934,830	8,946	62,242	1,951	9,424
	1931	13,630	6,550	.....	1,700	312,173	546,810	11,202	21,589	815	6,165
	1932*	6,198	4,941	.....	1,037	98,580	128,255	11,626	4,192	580	1,347
Akron	1922	608,828	355,947	.....	200,500	285,716	109,151	61,582	.....	.....	.....
	1923	871,499	445,806	.....	273,849	298,879	29,425	75,208	.....	.....	.....
	1924	913,459	272,217	.....	219,339	363,680	41,321	57,357	.....	.....	.....
	1925	871,757	370,956	.....	175,242	.....	.....	.....	188,342	36,544	18,049
	1926	972,482	379,757	3,556	91,301	513,536	50,591	138,602	201,421	19,594	26,354
	1927	534,728	309,712	1,638	57,420	397,423	140,689	611,904	259,009	35,076	29,016
	1928	703,666	224,516	273	36,793	547,990	92,385	447,271	273,369	31,494	37,129
	1929	927,053	194,449	3,437	162,119	566,334	18,811	331,681	251,668	25,173	53,120
	1930	906,285	171,133	523	167,853	446,958	2,986	208,908	192,735	15,862	43,356
	1931	896,474	257,421	.....	119,751	217,886	873	195,698	121,504	4,901	19,041
	1932*	389,176	127,808	.....	31,978	71,939	7,637	103,791	41,670	1,079	2,958

[fol. 65]

Canton	1922	165,428	141,554	.....	9,666	100,163	75,489	5,432	.....	.....	.....
	1923	2[illegible],270	140,536	.....	6,464	141,121	50,931	4,768	.....	.....	.....
	1924	319,479	168,871	.....	4,700	94,037	152,268	5,601	.....	.....	.....
	1925	443,547	127,988	.....	1,802	93,370	262,064	2,259	16,219	903	91,265
	1926	462,517	82,163	588	1,708	98,292	163,784	51,727	37,542	1,061	116,398
	1927	279,264	97,672	153	379	121,644	143,231	70,373	54,691	3,114	127,742
	1928	266,922	94,988	143	665	135,032	144,526	72,262	70,809	2,827	75,663
	1929	198,043	140,408	571	22,521	148,580	262,229	54,598	72,013	5,256	85,072
	1930	206,281	85,419	334	86,919	87,605	183,078	35,122	50,097	2,478	45,329
	1931	204,573	113,122	555	45,840	39,961	169,556	9,171	31,752	1,311	2,265
	1932*	69,834	47,269	.....	8,790	12,036	36,914	2,546	13,247	397	49
Massillon	1922	27,999	117,021	.....	632	.....	.....	.....	.....	.....	.....
	1923	39,041	133,368	.....	3,605	.....	.....	.....	.....	.....	.....
	1924	40,352	122,359	.....	11,922	.....	.....	.....	.....	.....	.....
	1925	49,259	173,516	.....	10,823	.....	.....	.....	.....	.....	.....
	1926	47,102	182,173	19,027	5,785	3,053	169	1,322	14,471	256	000
	1927	12,473	124,371	14,515	311	4,649	261,869	45,746	762	000	000
	1928	15,185	113,314	7,522	58	5,076	334,487	1,720	589	101	000
	1929	20,199	119,347	6,087	.....	6,112	285,585	881	690	000	67,388
	1930	49,567	96,075	6,072	5,043	1,541	129,422	227	339	50	29,123
	1931	100,507	79,731	4,128	3,895	1,340	100,096	370	121	000	175
	1932*	25,185	33,806	.....	1,563	967	49,015	3,191	000	000	000
Mansfield	1922	50,688	7,259	.....	8,068	.....	.....	.....	.....	.....	.....
	1923	55,583	5,915	.....	28,637	.....	.....	.....	.....	.....	.....
	1924	23,108	959	.....	22,517	.....	.....	.....	.....	.....	.....
	1925	59,789	1,819	.....	25,507	.....	.....	.....	.....	.....	.....
	1926	60,179	256	.....	32,071	837	000	4,483	.....	.....	.....
	1927	21,683	433	.....	19,537	9,788	913	25,302	.....	.....	.....
	1928	26,507	1,250	.....	17,363	23,220	000	28,289	.....	.....	.....
	1929	68,487	415	.....	26,646	11,727	720	9,891	.....	.....	.....
	1930	61,991	578	.....	23,560	8,206	859	13,277	.....	.....	.....
	1931	32,424	455	.....	16,910	3,137	23	13,839	.....	.....	.....
	1932	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

(* January to June, 1932, inclusive.)

[fol. 66] APPENDIX C

Statement Showing Gross Revenue from Rate, Absorbed Switching Charges, Operating Revenue After Switching Absorptions, Estimated Transportation Cost. (Oper. Expenses and Passenger Deficit) and Net Operating Revenue, per Ton, on Bituminous Coal Transported from Ohio No. 8 Coal District to Cleveland, South Lorain, Huron, Canton, Massillon and Akron, Ohio

From Ohio No. 8 coal district to:	Cleveland	South Lorain	Huron	Canton	Massillon	Akron
1. Gross revenue from rate per ton	145.0¢	145.0¢	155.0¢	108.0¢	108.0¢	128.0¢
2. Absorbed switching charges	16.0¢	22.1¢	.....	00.6¢	.....	00.7¢
3. Operating revenue (after switching absorptions)	129.0¢	122.9¢	155.0¢	107.4¢	108.0¢	127.3¢
4. Estimated transport cost (oper. expenses and pass. deficit)	80.2¢	75.8¢	79.1¢	63.9¢	65.2¢	78.5¢
5. Net operating revenue	48.8¢	47.1¢	75.9¢	43.5¢	42.8¢	48.8¢
6. Per cent net operating revenue of gross revenue from rate	33.66%	32.48%	48.97%	40.28%	39.63%	38.13%
7. Operating ratio (relationship item 4 to item 3)	62.17%	61.68%	51.03%	59.50%	60.37%	61.67%

[fol. 67] APPENDIX D

No. 25566

Rates to remove undue preference against localities and interstate shippers of bituminous coal from the rate districts of Pittsburgh, Freeport, and Connellsville, in Pennsylvania, and Fairmont in West Virginia, and undue preference of localities and shippers of bituminous coal from eastern Ohio districts to northeastern Ohio territory which districts and territory are herein described, and to remove unjust discrimination against interstate commerce.

From

Eastern Ohio districts:

Ohio No. 8; Middle; Massillon; Cambridge; Crooksville; Hocking; and Pomeroy.

To

Destinations in northeastern Ohio, east of a line drawn through Sandusky, Galion and Columbus and north of an east-and-west line drawn through Columbus, including Canton, Massillon, Mansfield, Cleveland, Lorian, Huron, Akron, Orrville, Rocky River and intermediate points.

Rates not less than those applicable from and to the points or groups named, and in effect immediately prior to August 1, 1932.

[fol. 68] Orders

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 2ND DAY OF MAY, A. D. 1933

No. 25566

Intrastate Rates on Bituminous Coal Within the State of Ohio

It appearing, That by order of October 3, 1932, supplemental order of October 28, 1932, and second supplemental order of December 7, 1932, the commission, upon its own motion, entered upon an investigation concerning the lawfulness of the rates, charges, rules, regulations, and practices governing the transportation of bituminous coal, in carloads, between certain points within the State of Ohio as named in petitions filed on behalf of certain common carriers by railroad operating in the State of Ohio, which said carriers as well as all common carriers by railroad by railroad operating in the State of Ohio, were herein made respondents.

It further appearing, That full investigation of the matters and things involved has been had, and that the commission has on the date hereof, made and filed its report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That said respondents according as they participate in the transportation be, and they are hereby, notified and required to cease and desist upon practicing the undue prejudice as between persons and localities and undue, unreasonable, and unjust discrimination against interstate commerce found in the said report to exist in the relation between the interstate rates on bituminous coal, in carloads, from Pennsylvania and West Virginia, to destinations in Ohio, on the one hand, and the intrastate rates on like traffic between points in Ohio as indicated in the said report, on the other, and to establish, on or before June 10, 1933, upon notice to this commission and to the general

public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the intrastate transportation of bituminous coal, in carloads, from and to [fol. 69] the said points in Ohio rates which shall not be less than the rates or bases of rates prescribed as minima in the said report and set forth in Appendix D thereto; provided, that to the specific rates, or the rates resulting from the bases of rates, found in the said report to be minima for intrastate application as aforesaid, should be added the emergency rates or charges authorized in the Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 179 I. C. C. 215; 191 I. C. C. 361; provided, the emergency rates or charges so authorized have been or are contemporaneously added to the interstate rates from Pennsylvania and West Virginia districts to the same destinations.

And it is further ordered, That this order shall continue in force until the further order of the commission.

No. 25590

WESTERN PENNSYLVANIA COAL TRAFFIC BUREAU ET AL.

v.

AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL.

No. 25657

PROPERTY OWNERS' COMMITTEE ET AL.

v.

AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaints in the above-entitled proceedings, be, and they are hereby, dismissed.

[fol. 70] Coal from Pennsylvania to Northern Ohio

Investigation and Suspension Docket No. 3833

Coal from Pennsylvania to Northern Ohio (2)

It appearing, That by order dated September 8, 1932, in Investigation and Suspension Docket No. 3801, and by order dated November 29, 1932, in Investigation and Suspension Docket No. 3833, the commission entered upon a hearing concerning the lawfulness of rates, charges, regulations and practices stated in the schedules enumerated and described in said orders and suspended the operation of said schedules until April 9 and July 27, 1933, respectively;

It further appearing, That by order dated October 3, 1932, the commission vacated and set aside the said order of September 8, 1932, in Investigation and Suspension Docket No. 3801 in so far as it suspended the operation of the schedules enumerated and described therein, and that the provisions of said order of September 8, 1932, whereby the commission entered upon a hearing concerning the lawfulness of rates, charges, regulations and practices contained in the schedules enumerated and described therein were continued in full force and effect;

And it further appearing, That a full investigation of the matters and things involved has been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the order entered in Investigation and Suspension Docket No. 3833, suspending the operation of said schedules be, and it is hereby vacated and set aside as of June 10, 1933, and that the proceeding in Investigation and Suspension Dockets Nos. 3801 and 3833 be discontinued.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 71] EXHIBIT "B" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. 25885

Surcharge on Bituminous Coal Within the State of Ohio

Submitted April 19, 1933. Decided May 9, 1933

Intrastate rates on bituminous coal required by State authority in Ohio, through the refusal to permit application of surcharges on and after April 1, 1933, corresponding to those maintained on interstate traffic found to result in unjust discrimination against interstate commerce.

James Stillwell and D. P. Connell for respondents.

John Fox Weiss and P. E. Fickenscher for Public Service Commission of Pennsylvalia, and Joseph W. Herrold for Public Utilities Commission of Ohio.

Ernest S. Ballard, D. F. Hurd, F. E. Siepert, Henry C. Hall, Alex M. Bull, A. G. Gutheim, A. S. Boden, E. J. McVann, John B. Keeler, W. M. Lorenz, J. C. Argetsinger, W. H. Welsh, A. C. Graham, and H. D. Rhodehouse for other parties.

Report of the Commission

McMANAMY, Commissioner:

This investigation was instituted on petition of the Public Service Commission of Pennsylvania to determine whether, through refusal of the Public Utilities Commission of Ohio to permit increases in freight rates on bituminous coal on and after April 1, 1933, for intrastate traffic within the State of Ohio corresponding to those which were approved for interstate traffic in Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 179 I.C.C. 215, 191 I.C.C. 361 such intrastate rates cause or will cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce, on the other, or any unjust discrimination against interstate or foreign commerce; and if so, what rates shall be prescribed to remove such unlawful advantage, preference, prejudice or discrimination. All railroads subject to our jurisdiction operating within the State of Ohio were made

respondents to this proceeding. Rates herein will be stated in amounts per ton of 2,000 pounds.

A surcharge of 6 cents per net ton on interstate shipments of bituminous coal, in carloads, was authorized in Fifteen Per Cent Case, 1931, and is now added to the interstate rates to and from Ohio. This surcharge was also added to intrastate shipments of bituminous coal within the State of Ohio, and published to expire March 31, 1933, in accordance with the expiration date of the interstate surcharges. We, however, authorized the extension of the expiration date of the surcharge on interstate traffic from March 31, 1933, to September 30, 1933. (191 I.C.C. 361.) The carriers by railroad operating in Ohio, through their agent, B. T. Jones, sought authority of the Ohio Commission to publish a tariff on less than statutory notice to continue beyond March 31, 1933, the surcharge on bituminous coal within that State. This authority was denied by suspension of the tariff until August 28, 1933, and, accordingly, the 6-cent surcharge on bituminous coal was removed from intrastate shipments on and [fol. 72] after April 1, 1933. Upon the removal of this surcharge respondents herein also filed a petition asking for this investigation, not only as to bituminous coal, but as to all commodities. This proceeding, however, relates only to bituminous coal and the remainder of the commodities constitute a similar issue in another proceeding now pending.

The surcharges generally apply interstate throughout the country. Subject to certain exemptions the surcharges also have general application intrastate, either with the authority of the State commissions or upon our orders in Increases in Intrastate Freight Rates, 186 I.C.C. 615; 191 I.C.C. 351, and other similar cases.

In (Docket No. 25566) Intrastate Rates on Bituminous Coal Within the State of Ohio, I.C.C. ——, decided May 2, 1933, the issue with respect to adding the 6-cent surcharge to the rates on bituminous coal between points in northeastern Ohio was considered. We there said, among other things, that to remove discrimination against interstate commerce, the surcharge should be added to the intrastate rates, provided similar surcharges were contemporaneously added to the interstate rates from Pennsylvania and West Virginia to the same destinations. The record in that case was

stipulated into the present record. The territory there under consideration in northeastern Ohio included that portion of Ohio lying east of the Sandusky-Galion line and north of an east-and-west line drawn through Columbus, including Canton, Massillon, Cleveland, Lorain, Huron, Akron, Orrville, Rock River, and intermediate points. The facts justifying the conclusions in that case are fully stated in the report therein and need not here be repeated. Likewise it is unnecessary to describe in detail the financial condition of the carriers in this territory and the effects of maintaining lower rates within the State of Ohio than on interstate traffic as the findings therein dispose of the issue as to the application of the surcharge to northeastern Ohio.

The evidence shows keen competition at Ohio destinations between interstate shippers in Pennsylvania, West Virginia, Virginia, and other nearby coal producing States, on the one hand, and Ohio intrastate shippers of the same commodity. Coal moves from the inner and outer crescent districts to Ohio in considerable quantity. The volume of tonnage to Ohio destinations from Ohio mines as compared with that from the crescents is shown in the Appendix. The surcharge has so recently been removed from Ohio intrastate shipments of bituminous coal that no figures are presented to show how much interstate tonnage has been lost since that time.

It is contended on behalf of the Eastern Ohio Coal Operators that the degree of competition between intrastate and interstate shippers of bituminous coal as shown to exist at destinations in northeastern Ohio, does not prevail to "affected" territory immediately west of the northeastern Ohio territory and defined in Bituminous Coal to C.F.A. Territory, 46 I.C.C. 66, and to so-called "No man's land" in southern Ohio immediately south of the other two territories defined. The record shows that there is a substantial movement to destinations in Ohio other than to the northeastern territory.

Based on the tonnage which moved during the period from April 1 to September 30, 1912, when 1,311,011 tons of bituminous coal moved intrastate in Ohio, and when the surcharge was applicable, an estimated loss of $78,660.66 in revenue is indicated by the elimination of the surcharge. A strike in some of the Ohio districts began on or about April 1, 1932, and the tonnage was probably less than ordinary during the

[fol. 73] six-months period shown. Using the first two months of 1933 as more representative the estimated loss in surcharge revenues for a period of six months at the same rate of movement would be $260,455.68. If the surcharge were removed from the rates from the crescents to Ohio the estimated surcharge revenue loss would be $389,542.86 based on the volume of movement during the first period mentioned and $561,624.84 based on the last period mentioned.

It is deemed unnecessary to repeat the general discussion in the previous reports in Increases in Intrastate Freight Rates, supra, regarding the surcharges there authorized, the propriety of dealing with them in the aggregate, and the reasonableness of the interstate rates. The present interstate rates on bituminous coal from Pennsylvania and West Virginia to northeastern Ohio were found to be reasonable in Intrastate Rates on Bituminous Coal Within the State of Ohio, supra. All of these rates to other destinations in Ohio bear a specific relation, differential or otherwise, to each other. The record is sufficient to find that a difference of 6 cents per ton constitutes an obstruction to interstate commerce. This case is similar *in all important respects to* many others that we have considered and in which we have required generally the same increases for intrastate as authorized for interstate traffic.

We find that in view of the surcharges applicable interstate on bituminous coal, under our findings in Fifteen Per Cent Case, 1931, supra, respondents' intrastate rates in Ohio on bituminous coal, to which no corresponding surcharges have been added, result and will result in unjust discrimination against interstate commerce. We further find that this unjust discrimination shall be removed by applying to the intrastate rates in Ohio on bituminous coal to the same surcharges as are and for the future may be contemporaneously maintained by respondents in accordance with the findings in the case just cited, on interstate shipments of bituminous coal.

These findings are without prejudice to the right of the authorities of the State of Ohio or of any other interested party to apply in the proper manner for a modification of our findings and order, as to any specified intrastate rate on the ground that it is not related to interstate rates in such a way as to contravene the provisions of the interstate commerce act.

An order will be entered in accordance with the foregoing findings.

AITCHISON, Commissioner, dissenting:

For the reasons stated in my separate expresion in Increases in Intrastate Freight Rates, 186 I. C. C. 615, at pages 666-667, I am unable to agree with the conclusions of the majority.

TATE, Commissioner, dissenting:

For the reasons given in my dissenting in part expression in Increases in Intrastate Freight Rates, 186 I. C. C. 615, I dissent from the conclusions and the order of the majority in the instant case.

[fol. 74]

APPENDIX

Docket No. 25885

Net Tons of Bituminous Coal from all Origin Districts in Ohio and the Crescents to Ohio Destinations for the Period 1923 to 1932, Inclusive, also January and February, 1933. Authority Reports of the Ohio Bureau of Coal Statistics

	From Ohio to Cleveland	From Crescents to Cleveland	From Ohio to Lorain & South Lorain	From Crescents to Lorain & South Lorain	From Ohio to Akron	From Crescents to Akron
1923	3,352,761	4,200,604	521,732	1,878,074	1,631,951	539,451
1924	2,869,524	4,266,746	546,262	1,467,237	1,422,752	770,294
1925	3,007,066	4,988,676	581,807	1,707,386	1,437,925	951,314
1926	2,703,612	5,632,377	454,157	2,097,801	1,478,772	1,078,133
1927	1,444,470	6,340,321	280,400	1,726,215	911,354	1,621,982
1928	999,793	6,736,740	209,135	2,151,505	986,925	1,573,586
1929	1,395,922	6,518,970	114,474	2,230,056	1,297,158	1,379,031
1930	1,365,070	5,204,848	81,446	1,591,992	1,256,843	1,006,830
1931	1,291,034	3,844,910	27,290	1,062,077	1,290,925	665,060
1932	1,228,741	2,909,444	84,999	451,121	1,101,561	503,467
1933 Jan. Feb.	390,010	573,256	32,968	51,195	269,820	69,954

	From Ohio to Canton & East Canton	From Crescents to Canton & East Canton	From Ohio to Massillon	From Crescents to Massillon	From Ohio to Mansfield	From Crescents to Mansfield
1923	420,184	389,563	186,164	(a)	238,474	(a)
1924	496,101	410,077	184,188	(a)	121,460	(a)
1925	574,100	566,015	257,763	(a)	19,206	(a)
1926	548,014	552,159	254,848	59,248	131,293	91,694
1927	372,051	608,827	151,716	370,494	63,061	129,613
1928	362,952	566,630	136,203	421,618	66,549	143,706
1929	361,592	716,333	145,689	439,458	118,701	107,871
1930	378,953	462,064	155,757	194,971	112,922	93,509
1931	365,090	291,571	188,261	114,672	88,418	76,086
1932	214,825	102,841	86,460	61,503	78,493	78,159
1933 Jan. Feb.	45,499	9,347	17,780	50	18,876	15,362

	From Ohio to Toledo	From Crescents to Toledo	From Ohio to All Ohio destinations	From Crescents to All Ohio destinations
1923	823,781	1,904,495	12,619,085	27,616,239
1924	539,745	1,627,876	10,266,517	27,316,679
1925	542,498	2,203,966	10,290,038	31,415,046
1926	458,968	2,031,664	10,319,387	33,932,216
1927	280,147	2,243,215	6,221,113	34,919,529
1928	221,694	1,755,051	5,334,794	35,573,997
1929	344,869	1,699,884	7,319,111	35,925,830
1930	321,710	1,409,356	7,208,215	28,418,876
1931	421,812	1,058,179	7,218,383	21,241,806
1932	324,451	875,679	5,416,849	16,422,893
1933 Jan. Feb	67,801	230,675	1,446,976	3,120,138

(a) No figures reported.

[fol. 75]

Order

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C. ON THE 9TH DAY OF MAY, A. D. 1933.

No. 25885

Surcharge on Bituminous Coal Within the State of Ohio

It appearing, That by order dated March 29, 1933, the commission upon its own motion entered upon an investigation concerning the lawfulness of the rates and charges on bituminous coal, maintained by common carriers by railroad within the State of Ohio which said carriers were made respondents herein, and that the Public Utilities Commission of Ohio refused to authorize or permit a continuance of the increases between points in the State of Ohio similar to those permitted by this commission for the transportation of bituminous coal, in carloads, in interstate commerce;

It further appearing, That a full investigation of the matters and things involved has been had and that the commission has, on the date hereof, made and filed its report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the unjust discrimination against interstate commerce found in said report to exist, and to establish, put in

force, and maintain for the transportation of bituminous coal, in carloads, in intrastate commerce within the State of Ohio, rates which shall not be lower than the rates now in force and applicable to the transportation of such traffic within the State of Ohio, plus the surcharge authorized by the findings in Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 179 I. C. C. 215, and 191 I. C. C. 361, on corresponding interstate traffic, except that the said surcharge shall be added to the basic rates prescribed as minima in Intrastate Rates on Bituminous Coal Within the State of Ohio, I. C. C. decided May 2, 1933, so long as such surcharge is maintained on said interstate traffic in accordance with said findings in Fifteen Per Cent case, 1931, supra.

It is further ordered, That this order shall become effective on June 10, 1933; that respondents shall comply therewith upon not less than one day's notice to this commission and to the general public by filing and posting in the manner prescribed in section 6 of the interstate commerce act; and that it shall remain in force until the further order of the commission.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 76] EXHIBIT "C" TO PETITION

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 7252

REPUBLIC STEEL CORPORATION, Complainant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, The Pennsylvania Railroad Company, The Pittsburgh and West Virginia Railway Company and The Wheeling and Lake Erie Railway Company, Defendants.

Submitted March 28, 1932. Decided June 30, 1932

Report of Commission

Complainant is a corporation engaged in the production, sale and shipping of various iron and steel products. It owns and operates steel plants, located at Canton, Mas-

sillon, Youngstown, Cleveland, Ohio, and elsewhere, with its principal office at Youngstown, Ohio. By complaint filed August 17, 1931, it alleges that the rates charged by the defendants for the transportation of bituminous coal, in carloads, as published in Agent F. V. Davis' tariff, Ohio Number 48, from mines and stations located on the lines of the defendants, in the Middle, Massillon, and Number 8 coal producing districts to Canton and Massillon, Ohio, are unreasonable, unjustly discriminatory, unduly prejudicial, in violation of Sections 504, 512, 540 and 567, General Code of Ohio; that they are higher, actually or relatively, than the rates published for the transportation of other low grade commodities, between points in the State of Ohio; and that they apply generally for single line movements, which in many instances involve circuitous hauls, whereas rates should also be published and maintained for joint line hauls. Complainant does not specifically attack the rates from the mines and stations in the Coshocton district, located on the Pennsylvania railroad; neither are the rates from the Cambridge district to Canton and Massillon, Ohio, attacked. We are asked to prescribe lawful rates for the future.

Hereinafter, unless otherwise specified, rates will be stated in cents per ton of 2000 pounds, and where rates are shown herein, without mention being made of the commodity, they will be understood to represent rates on bituminous coal in carload lots. The Baltimore and Ohio Railroad; The New York Central Railroad Company; The Pennsylvania Railroad Company; The Pittsburgh and West Virginia Railway Company, and The Wheeling and Lake Erie Railway Company, will hereinafter be referred to, respectively, as: "B. & O.," "N. Y. C.," "Penna.," "P. & W. Va." and "W. & L. E.," unless otherwise noted. Where the "Davis tariff" is referred to herein it will be understood to mean Agent F. V. Davis' tariff, Ohio Number 48.

The rates involved, herein under attack from the Massillon district range from 64 to 126 cents per ton and from the Middle district; 76 to 126 cents per ton, although the prevailing rate from this district is 101 cents per ton to both Canton and Massillon, Ohio. The rate under attack from the Ohio Number 8 district is 126 cents per ton to Canton and Massillon, Ohio. Present rates from the Middle

or Ohio Number 8 districts to Canton and Massillon, Ohio, which exceed 126 cents are not at issue in this proceeding. Rates named herein do not include the temporary emergency charge of 6 cents per ton authorized in our Docket 7245, dated December 29, 1931. The rates involved are all short haul rates, as is natural, in view of the fact that Massillon is located in the Massillon coal producing district; Canton in the Middle district, and both of these points are but a short distance away from the Ohio Number 8 coal producing district.

The districts involved are the Ohio coal producing districts, from which the complainant normally draws its supply of steam coal. The major tonnages moves from the Ohio Number 8 and Middle districts. Some tonnage moves from the Massillon district, with occasional movements from the Cambridge District. There is practically no tonnage moving from the Crooksville, Hocking, Pomeroy or Shawnee districts to Canton and Massillon.

[fol. 77] Points of origin in the Middle district are located on the lines of the B. & O., N. Y. C., Penna. and W. & L. E., as follows:

Points on the B. & O. main line, between Freeport and Beach City, Ohio, including several branches; points on the C. T. & V. branch from Valley Junction, Ohio, to North Industry, Ohio. Amsterdam, Apex and Bergholz, Ohio, on the Alliance division of the N. Y. C. Points on the C. & P. division of the Penna., northwest of East Liverpool, Ohio, through Bayard and Fairhope, Ohio, thence over the Pittsburgh-to-Chicago main line division; points on the Tuscarawas branch of the C. & P. division, southwest from Bayard, through Valley Junction, Dover and New Philadelphia; points on the Marietta division south from Dover through New Comerstown; points on the Akron division south of Orrville, Ohio; points on the W. & L. E. main line between Bowerston and Bolivar, Ohio; Carrollton branch points east of Canton to Sherrodsville, and the main line between Canton and Dresden, Ohio.

Mines and stations in the Coshocton district on the "Penna." are in the vicinity of Coshocton, Ohio, and includes points between Bowerston and Adams Mill along the main line.

Mines in Number 8 district are served by the B. & O., N. Y. C., P. & W. Va., Penna., and W. & L. E., as follows:

Points in the Wheeling Creek No. 8 district, on the C. L. & W. division of the B. & O., between Bellaire, Ohio, and Piedmont, Ohio, including points on the St. Clairsville and Northern branch; points in the St. Clairsville No. 8 district on the main line; points on Newark division of the B. & O. between Bellaire and Barnesville, including St. Clairsville branch; points in the Pittsburgh No. 8 district, on the main line of the Penna., between Bellaire and Toronto, Ohio; P. O. V. & C. branch extending south from Bellaire to Powhatan, Ohio; points on the main line between Steubenville and Miller, including points on the Cadiz branch; points on the river division of the W. & L. E. between Steubenville and Yorkville, Ohio; points on the main line of the Toledo division between Warrenton and Rexford, Ohio; points on the Adena branch between Adena and Neffs, Ohio; Bradley, Dillonvale, Hopedale, Harpersville, Piney Fork, Pan Handle and Smithfield, Ohio, on the Alliance division of the N. Y. C.; Chandler, Hopedale, Kolmont, New Alexandria, Reed, Smithfield and Wayco, Ohio, on the P. & W. Va.

Brewster, Ohio, located on the W. & L. E., is the only station at which an active mine is located, in the Massillon district.

The Cambridge district is served by the B. & O. and Penna. as follows:

Points on the Newark division of the B. & O. between Sonora and Baileys Mills, including Eastern Ohio branch, and National Coal Company branch, and points on the Marietta division of the Penna., Elba, Ohio, to Cambridge, Ohio.

The foregoing paragraphs give a general outline of the districts, that will be given consideration in this proceeding; names of stations and mines included therein are fully set forth on pages 7 to 19 of the Davis tariff. A number of mines and stations listed in this tariff however, are at present inactive and many have been abandoned, therefore all of the mines and stations listed therein will not be considered in arriving at our conclusions and will only be used for comparative purposes as may hereinafter be found necessary.

Complainant does not attack the rates from the Coshocton district on the Penna.; nor from the Cambridge district to Canton or Massillon. However, the rate adjustment from Southeastern Ohio mining districts, has been set up in such

a manner, and carried over such a long period of time, and are so closely related, we feel inclined to the opinion that any adjustment in rates, from one, or portions of any one group, would not be complete without consideration of such other related groups or portions of groups. We will therefore give such consideration as may be necessary to all of the groups above outlined in the following paragraphs.

The Coshocton district on the Penna., although carried as a separate producing district in the Davis tariff, is located in, and now considered a part of the Middle district, Group 5 rates applying from both districts. The record shows that at one time the Coshocton district on the Penna. carried the same rate as a part of the Number 8 district origin stations, of 126 cents per ton, but this was reduced on February 23, 1925 to 101 cents per ton, or the same as [fol. 78] applicable from the Middle district, generally, to Canton and Massillon, Ohio. Points in the Coshocton district on the W. & L. E., are carried in the Davis tariff as being located in the "Middle-Coshocton Sub-district," and the rates from this sub-district are attacked along with the balance of the Middle district. Complainant's exhibit number one, definitely outlines all of the coal producing districts in Southeastern Ohio. This exhibit plainly shows Coshocton district points located within the boundary lines of the Middle district; although the Coshocton district on the Penna. is excluded from the complaint; the complainant admitting its reason for excluding this district being due to the long distances from these mines to Canton and Massillon brought about by the circuitous route of the Penna. It is obvious that the exclusion of these mines, would reduce the average mileage from the Middle district to some extent; however, the question of mileage in itself does not justify the exclusion of a portion of a group from consideration. A group set up for rate-making purposes, must be treated as a whole.

The Interstate Commerce Commission in Midcontinent Oil Rates, 36 I. C. C. 109 at 115, said:

"If a blanket or group rate is a reasonable one, founded upon sound business and transportation considerations, the reasonableness of a rate from the group to a given point is properly to be determined with respect to the average distance from all points in the group. The selection for comparative purposes of the shortest distance would be as

unjust to the carriers as the selection of the longest distance point would be unjust to the shippers. The group must be treated as a whole."

If the carrier however, elects to limit the route to its own line, and such route is unduly circuitous in comparison with a reasonable joint line shorter route, then the mileage over the latter route should be employed in the computation of average mileages for rate-making purposes. Defendants' exhibit number 40 lists but 3 active mines in the Coshocton district, viz: Meecham and Edwards, located at Philadelphia Roads, Ohio, and Franklin No. 2 located at Conesville, Ohio. The Davis tariff carries a list of 9 billing points and 17 mines. Defendants' exhibit number 46 shows the distance to Massillon, from Philadelphia Roads as 99 miles and from Conesville 98 miles via the Penna. direct. If routed via the joint line route of the Penna.-B. & O., the distance from Philadelphia Roads to Massillon would be 39.6 miles, and from Conesville over the joint line route of the Penna.-W. & L. E. 53.5 miles. From Conesville to Canton via the W. & L. E. the distance is 61 miles, whereas via the Penna. route it is 88 miles. From Philadelphia Roads to Canton via the joint line route of the Penna.-B. & O. the distance is 43.7 miles, whereas the distance via the Penna. route direct is 100 miles. Under the existing group arrangement we feel impelled to regard as inseparably related, all points within the Coshocton and Middle districts, at which active mines are located, and treat them as a unit regardless of the rails, on which mines or stations, within the boundaries of these districts are located.

Defendants have, throughout their testimony and in their exhibits, attempted to combine the Cambridge district with the Number 8 district for the principal reason that the same rates apply from both districts to Canton, Massillon and certain other points in Northern Ohio. Statement is also made that these two districts are treated the same for rate-making purposes to Akron, Cleveland, Toledo, Wooster and many other points in Ohio. Defendants' exhibits numbers 28 and 29 show the extent to which the rates from these two districts are on the same level. It is true that to a number of points in Northern Ohio the rates are on the same level, but this is not true in many other instances as

may readily be seen by comparison of these two exhibits. The contour and shape of the destination grouping from the No. 8 district is entirely different in many instances. For example, from the No. 8 district, there is a group rate of 134 cents to the Youngstown district, while the rate from the Cambridge group to the same destination district is 144 cents. The 126 cent destination group from the No. 8 district is considerably different than from the Cambridge district, in fact by comparing the two exhibits, but few of the destination groups in Northern Ohio carry the same boundary lines. This is also found true to points in other localities, particularly on short hauls. The record is not persuasive that these two districts should receive the same consideration and be treated as one group for rate-making purposes. The disparity in the average mileages alone would not warrant the consideration of these two groups as one unit. The rates from the Cambridge district are not at issue in this proceeding and will not be given further consideration.

[fol. 79] Parties of record all agree that the Massillon district is involved to a very limited extent, there being but one producing mine in that district and the coal moving from that mine, which is located at Brewster, Ohio, on the W. T. & D. takes a 76 cent rate to Massillon, Ohio, for a haul of 10 miles and a rate of 101 cents to Canton, Ohio for a haul of 17 miles.

The complaint involves principally the rates from the Middle-Coshocton and Number 8 districts. In summing up the rate situation involved in the movement of bituminous coal from Southeastern Ohio to Canton and Massillon, the record clearly shows that the prevailing rate from the Middle-Coshocton district is 101 cents per ton and from the Ohio No. 8 district, 126 cents per ton, to both destinations. By several methods of computation, different mileage results may be obtained and the parties of record spent considerable time in condemning methods employed by each other, in arriving at average distances, and could not agree upon a common ground for determining distances upon which to base the reasonableness of the rates, nor could they agree as to the number of active or producing mines or stations to be considered in computing average distances.

The Davis tariff names many stations and mines which neither party of record has taken into consideration and

this may be justified by the fact that the tariff covers the districts very generally, however, during the present period of depression many mines have been abandoned entirely or are inactive, others have been worked out and have been dismantled. Active mines were defined by Witness Kern, for defendants, as those from which shipments moved during the period January 1, 1929, to March 31, 1930. Complainant has used a list of what it considers active mines obtained from its coal purchasing department and defines such active mines as those with which a contract could be made for the purchase of coal. The defendants' list contains a number of mines and stations that do not appear upon the complainant's list. This Commission has no means of knowing just what mines are active, but we are inclined to the opinion that should our decision be based entirely upon present conditions, it might be found unjustifiable in a normal period. The period used by defendants for determining a list of active mines is more suitable, as it is to be more or less expected that mines that were active during that period will likely be active during any normal period. For the purpose of setting rates for the future, it is obvious that more credence should be given to normal conditions than a depressed business period such as we are experiencing today.

It would appear that complainant has listed, as active mines only those from which it is purchasing coal or perhaps only such mines as it may have definite knowledge of present operations. However, we cannot lose sight of the fact that the carriers are interested, not only in shipments moving to one industry, but from all mines located upon their rails to all consumers at either of the points of destination, herein under consideration, as well as points intermediate thereto. The list of active mines, shown in defendants' exhibit number 40, will therefore be used as a basis upon which to compute average mileages in determining rates for the future.

Complaint alleges that rates from the Middle, Massillon and Ohio Number 8 districts to Canton and Massillon, Ohio, are unreasonable, unjustly discriminatory, unduly prejudicial and in violation of several sections of the General Code of Ohio, as hereinbefore mentioned. Evidence submitted by complainant does not convince us that undue preference has been accorded any particular locality, firm

or corporation, or that complainant has been subjected to undue or unreasonable prejudice or disadvantage. The only testimony offered by complainant in support of its allegations under Section 567, relates to a difference in rates from certain producing territory to destinations at which it is alleged competitors of the complainant are located. Complainant was unable to show whether coal shipments actually moved on the rates which they named as constituting preference to a competitor. Allegations as to the unreasonableness of present rates under General Code Sections 504 and 512 and as to the establishment of joint rates under Section 540 will be disposed of later in this report; the record indicating that such allegations are not without merit.

Defendants offered certain rate comparisons in their attempt to support the reasonableness of the rates under attack. Defendants' exhibit number 55 shows rates between selected points in Ohio, West Virginia and Pennsylvania, of 76 to 151 cents for distances ranging from 0.4 to 101.1 miles. In one instance the exhibit shows a rate of 101 cents for distance of 4 tenths of a mile and the same rate for a distance of 47.5 miles. Defendants' exhibit number 56 is a statement of short route distances from certain selected mines in the Pittsburgh district near the Ohio border from which a rate of 159 cents applies to Canton and Massillon. [fol. 80] This same rate applies from all mines in the Pittsburgh district to the same points of destination, and the mileage from many of the mines in said district to Canton and Massillon, is much greater than from the selected mines listed. The mileages from these selected points are compared with short tariff route distances from certain mines in the Ohio Number 8 and Cambridge districts. This exhibit is of little probative value; first because the Cambridge district is included, although not at issue; second, most of the points used for comparison are located in the Cambridge district, in fact all of the 15 mines which the defendants list as active mines in the Cambridge district have been included, while only 14 of the 74 active mines in the Ohio Number 8 district are shown.

Methods of arriving at average distances, employed by parties of record, are at variance, defendants contending that all tariff routes from all active mines in each group to Canton and Massillon, Ohio, should be employed. Com-

plainant contends the proper basis should be the short tariff routes not unduly circuitous. Complainant cited four methods for computing distances, viz.: (1) The formula prescribed by the Interstate Commerce Commission in the Eastern Class Rate Case, 164 I. C. C. 314, namely, the shortest possible routes by which carload traffic can be handled without transfer of lading; (2) The formula prescribed in the Holmes and Hallowell Case, 60 I. C. C. 687, 713 and 69 I. C. C. 11, 18, by using the shortest possible route consisting of the lines or parts of lines of not more than three carriers; (3) The shortest distance via two line routes; (4) The shortest distance via the tariff routes. Defendants contend that average distances for measuring coal rates from a group, served by several carriers, should be determined by the use of mileages applying via all tariff routes, and cite an opinion of the Interstate Commerce Commission, Iowa Railroad Commissioners vs. A. & S. Ry. Co., 128 I. C. C. 293, 298, wherein the Interstate Commerce Commission held that it was unfair to consider only the shortest possible routes in measuring an established group rate which applies from points on a number of originating carriers and over various routes. We concur in this opinion. However, the Interstate Commission did not condemn the use of the shortest tariff routes, not unduly circuitous, in arriving at proper distances for a fair measure of rates. By referring to the report in the case cited, on the same page number and continuing to the next succeeding page, number 299, it will be found that the Interstate Commission, in arriving at their decision, used average distances over the shortest tariff routes not unduly circuitous.

Although complainant has submitted four methods of computing average distances, it is our opinion that three of the methods should not be used in determining a proper basis for adjusting the rates herein assailed, but each formula has been carefully considered. The use of the formula prescribed in the Eastern Class Rate Case, Supra, of using the shortest possible route by which carload traffic can be handled without transfer should not be applied to group adjustments, such as here under consideration, as that formula was prescribed for point to point class rates and has not to our knowledge been employed in group adjustments, except to a very limited extent. The use of the formula prescribed in The Holmes and Hallowell Case, supra, in ad-

justing rates will be discussed later in this report. The use of the shortest distance via two line routes should not in all instances be employed, due to the unfairness that would result from such a method in arriving at the proper compensation to carriers in covering the average service they must perform over long as well as short routes. Our findings herein will be based upon short tariff routes, except where they are unduly circuitous, computations will be based on the mileage over potential, workable and reasonable routes. Whether these routes are opened to the actual interchange of traffic is a matter which is left to the discretion of the carriers interested as no complaint is made as to service. The use of the reasonable tariff route distance is merely for the purpose of fixing a measure of the rates and does not necessarily govern the routes traversed as an operating matter.

From two of the three groups involved herein it is obvious that it would be unfair and improper to use all of the present tariff routes in arriving at average mileages upon which to base a rate that would be fair to the groups as a whole. The groups we are dealing with herein are not consistent groups, a number of exceptions prevail, depending upon the route used. Rates higher and lower than the prevailing rates in these districts are published, the higher rates generally applying over the longer tariff routes. We cannot do other than assume that the higher rates move but a small volume of traffic, if any at all, and must, therefore, generally be considered paper rates, which was admitted by defendants. From all mines and stations located on the Penna. in the Ohio Number 8 and Coshocton districts, the rates are restricted to the single line route of the Penna. without exception, to Canton and Massillon. This is also generally true from origin points on the Penna. in the Middle district. However, there are some exceptions where the |fol. 81| rates apply to Canton over jointline routes with the B. & O. and to Massillon with the W. & L. E.

The Holmes and Hallowell scale is relied upon to a considerable extent by complainant as a convenient means of disposing of the matters at issue herein, and such discussion concerning the use of this scale, in the instant case, is brought into the record. The Interstate Commerce Commission in an attempt to adjust certain differences between the state and interstate rates applying into northwest territory,

from the head of the lakes prescribed the so-called Holmes and Hallowell scale, as a proper basis of rates to apply within the territory involved and for the character of the traffic moving. Rates were prescribed in that proceeding for the movement of coal in carloads which has its origin in Ohio, West Virginia, Pennsylvania and elsewhere and moves by rail to Lake Erie ports, thence by water across the lake to Duluth, Minn., or Superior, Wis., and from these points, again by rail to destinations in Minnesota, North Dakota, South Dakota and Iowa. It is obvious that the scale was established as a basis for proportional rates on Ex Lake coal with a condition at the head of the Lakes differing materially from that applying on coal moving directly from mines to short haul destinations by rail. For this reason it is difficult to make comparisons between the two movements. The record is devoid of transportation cost comparisons with which to measure the reasonableness of the rates assailed by comparison with the Holmes and Hallowell scale.

The Interstate Commerce Commission in prescribing the Holmes and Hallowell scale found an ideal situation existing at the head of the Lakes whereby box cars received at grain elevators in tremendous numbers, loaded with grain, and when unloaded were available for use in loading outbound coal; another condition existed at Minneapolis and St. Paul, Minnesota, about 150 miles distance, where a large number of box cars were made empty and could be utilized at the head of the Lakes for this Ex Lake Coal Movement. These existing situations made an ideal arrangement for the carriers as it gave them almost a 100% efficiency for their cars. It was also stated that very little terminal service is required at the docks because the grain unloading is accomplished adjacent to the coal loading dock. This is to be contrasted with a very different condition in the mine areas which requires spotting and switching service as well as assembling for final transportation direct to destination. In Holmes and Hallowell vs. G. N. Ry. supra, at page 700, it appears that the average loading of coal at Lake Superior docks is slightly over 35 tons per car. By comparing this light loading with the heavier loading required in open top equipment, within the districts herein involved, consideration must be given the additional revenue gained by the heavier loading and this must be looked upon with favor in

taking under consideration any comparison with the Holmes and Hallowell scale. The Interstate Commission has said in several instances that this scale "offers a proper and convenient basis for comparison, due regard being had to differences in traffic and transportation conditions." That Commission and its respective divisions have time and again employed that yardstick for measuring coal rates in many sections of the country, and has applied certain percentages of that scale in prescribing rates. It has likewise found in other cases that the scale was an improper basis for rates where transportation conditions were found dissimilar to those for which the Holmes and Hallowell scale was prescribed. The Interstate Commission in Bedford Pulp and Paper Company et al., vs. Chesapeake and Ohio Ry. Co., et al., 163 I. C. C. 70, refused to use the Holmes and Hallowell scale and at page 674 said:

"Complainants stress the importance of the Holmes and Hallowell scale as a standard of comparison. While it is true that we have stated in various cases that the Holmes and Hallowell scale provided a convenient means of comparison due regard being had for differences in traffic and transportation conditions, nevertheless it should be remembered that coal moving under that scale requires no assembling service as is usual where traffic moves from the mines. The reports in the Holmes and Hallowell cases indicate that transportation conditions from the head of the Lakes to the Twin Cities were favorable and that the movement to some extent furnished lading for box cars unloaded at the lake ports which would otherwise have moved empty outbound, whereas it is well known that as to traffic from mines the return-empty movement is a large percentage of the loaded movement * * *. Because of the difficulty in determining the extent of the allowances necessary to compensate for these various differences in conditions it is impracticable to measure the reasonableness of the rates assailed by comparison with the Holmes and Hallowell scale."

[fol. 82] In Fiero and —nn vs. Pennsylvania Railroad Co., 147 I. C. C. 592 at 594, in speaking of the Holmes and Hallowell scale the Interstate Commission said:

"That scale applies on coal which does not require an assembling service such as is customary on coal traffic, and for the shorter distances at least could not be accepted as a fair measure of the rates here assailed even if the trans-

portation conditions between the two territories were otherwise substantially the same."

The Interstate Commission has in other cases rejected the Holmes and Hallowell scale as a fair basis for measuring the rates under attack and in each instance gave its reasons therefor. However, they have in many other cases approved the scale, in fact it would appear that it has been more often used than rejected. It has received consideration in cases involving rate adjustments in many sections and numerous citations are made where the scale has been employed or rejected depending upon the traffic and transportation conditions surrounding the rates under attack. The scale has been quite generally employed as a yardstock for measuring rates in the States of Illinois, Indiana and Iowa. This Commission has never used the Holmes and Hallowell scale in measuring Ohio rates and we find but two cases of record where the Interstate Commission has used the scale involving rates between, or to Ohio points. Consideration was given this scale in the case of American Rolling Mill Co. v. B. & O. R. R., 173 I. C. C. 357, 362, having to do with rates on bituminous coal from Cincinnati, Ohio (Ex River) to Hamilton and Middletown, Ohio. Also Coal Bituminous, Ex River, from Colona and Conway, Pa. to Youngstown, Ohio, 163 I. C. C. 3. This Commission, although giving the scale much consideration, is not at this time prepared to either accept or reject the same as a proper basis for the adjustment of Ohio intrastate rates, particularly short haul rates such as herein involved. Conditions differ materially in the services rendered under the rates prescribed in the Holmes and Hallowell scale and those under consideration here. The record is devoid of comparisons such as terminal costs, percentage of empty and loaded car movements, varying average carload weights and the revenues derived therefrom. It would appear that empty car movements exist to a less extent in handling coal from the head of the lakes than would apply in the Ohio mining districts, although it is well known that in the districts herein involved, open top equipment is utilized in many instances for handling low grade commodities other than coal thereby relieving, to some extent, at least, empty car movements. The record is silent, however, as to the extent to which these cars are utilized for the transportation of other materials such as slag, sand, brick, gravel, crushed stone, etc.

Complainant's exhibits Numbers 8 and 13 list a number of Illinois producing points, together with the rates applying therefrom to East St. Louis, Illinois, and include rates from the Belleville and Southern Illinois districts. These exhibits give as authority for the rates, Agent C. W. Galligan's tariff, I. C. C. No. 139. It is noted that rates from 125 mines and stations shown in exhibit Number 8 located in the Belleville Illinois producing district to East St. Louis, Illinois, are all 80 cents, which rate was prescribed by the Interstate Commerce Commission in Intrastate Rates on Coal to East St. Louis, Illinois, 142 I. C. C. 95, decided April 13, 1928 and 161 I. C. C. 371, decided February 10th, 1930. Distances are shown from 119 of the 125 stations and mines listed, to East St. Louis, ranging from 7 to 70.7 miles or an average of 36.2 miles from 119 stations. Exhibit Number 13 names rates from various other Illinois groups to East St. Louis, Illinois, which are shown in the following table. It will be noted that rates in this table are on a much lower level, distance considered, than the rates herein assailed.

Table A

From	No. of shipping points	Rate	Total mileage	Average mileage
Group 4 (Springfield district)	4	87	375.8	68.9
Group 5	2	84	145.0	72.5
" 6 (Duquoin district)	7	90	525.6	75.1
" 7 (Centralia district)	8	90	526.5	65.8
" 8 (Springfield district)	4	90	332.0	83.0
" 9 (Murpheysboro district)	7	96	542.1	77.4
" 10 (Southern Illinois district)	83	105	8564.9	103.2
" 11	3	99	246.8	82.3
" 12	3	97	323.6	107.9
" 13	1	103	122.1	122.1
" 14	9	89	750.8	83.4
" 15	4	93	342.5	85.6
" 16	1	96	100.9	100.9

[fol. 83] From the foregoing, it will be observed that from the group carrying the lowest average of 65.8 miles, the rate is 90 cents and from the group carrying the greatest average of 122.1 miles, the rate is 103 cents.

Discussion exists throughout the record as to comparisons with certain Indiana short haul rates, several points being cited from which a rate of 50 cents applies for distances of 10 miles and under located around Terre Haute, Indiana. This low rate is an exception rather than a general basis for Indiana short haul rates. It would appear that for similar distances many other rates of 60 cents exist. Terre Haute, Indiana, is a steel producing district, with a number of mines within a short distance therefrom and has an advantage of this low rate which is referred to,

and with which other short haul rates are compared. Similar rates for comparable distances in Indiana have come to the attention of the Interstate Commission on several occasions and they have declined to accept these low Indiana rates as standards of reasonableness. In Pittsburgh Coal Producers Ass'n. vs. P. C. C. & St. L. R. R. Co., 83 I. C. C. 145, 156. Also, In the Matter of Intrastate Rates Within State of Illinois, 146 I C. C, 127, 134, the Commission stated in each instance that its decision in Utilities Development Corp. v. P. C. C. & St. L. R. R. Co., 56 I. C. C. 694, was not intended as a criterion for judging short haul rates in general. It is true the Interstate Commerce Commission approved rates in this case which they did not desire used as criteria for short haul rates generally; however, matters of record in Utilities Development Corp., Supra, must have existed to influence their decision and the record speaks for itself. These comparisons are therefore not helpful in the instant case. They must be regarded exceptional rather than typical of the general level of Indiana rates for comparable distances. In New York Coal Co. vs. The H. V. Ry. Co., Public Utilities Commission of Ohio, Docket 2329, this Commission said:

"Under a known general similarity of transportation conditions in Indiana as compared with Ohio, there appears no reason why the short haul coal rates in Ohio should be materially higher than those prevailing in the State of Indiana."

The instant case however, is devoid of comparisons with Indiana intrastate rates, except for the few cited around Terre Haute, Indiana.

Defendants' exhibits 44 to 49 inclusive, list the names of mines from which coal was shipped to the Republic Steel Corporation at Canton and Massillon, Ohio. Such mines are shown as located on the B. & O., Penna., and W. & L. E. These indicate the following number of mines actually shipping coal during the periods as shown below:

From	Number of mines	Located on	For period
Middle district	6	Penna.	Year 1930 thru June 1931
Number 8 district	2	Penna.	" " " " "
Middle district	5	W. & L. E.	Year 1925 thru June 1931
Massillon district	1	W. & L. E.	" " " " "
Number 8 district	10	W. & L. E.	" " " " "
Middle district	15	B. & O.	" " " " "
Number 8 district	18	B. & O.	" " " " "

Total Middle-Coshocton district ..... 26 mines
" Massillon district ..... 1 mine
" Number 8 district ..... 30 mines

Exhibit 40 offered by defendants gives a list of what they term active mines and names 74 in the Number 8 District, 54 in the Middle-Coshocton District and 1 in the Massillon District from which shipments moved during the period, January 1, 1929 to March 31, 1930, inclusive.

Defendants' exhibits 50, 51 and 52 give the following data as to the number of cars of coal moved to the Republic Steel Corporation during the year 1930 thru June 1931, over the Penna., W. & L. E. and B. & O.;

[fol. 84]

From Districts	No. of cars received during year 1930	No. of cars received during 1st 6 months 1931	Received at	Via
Middle	127	191	Canton	Penna.
Pgh. Ohio No. 8	5	23	"	"
No. 8	3	78	"	B. & O.
Middle	0	61	"	"
No. 8	0	54	"	W. & L. E.
Middle	1294	1073	"	"
Pgh. Ohio No. 8	518	301	Massillon	Penna.
Middle	23	21	"	"
No. 8	380	130	"	B. & O.
Massillon	71	313	"	B. & O.
Middle	55	2	"	W. & L. E.
No. 8	54	77	"	"
Total	442	874	"	"
	2972 cars	3198 cars		

Grand Total—6170 cars.

Complainant's exhibit No. 2 shows the following tonnage shipped to Canton and Massillon during the years, 1928, 1929 and 1930, compared with the tonnage received by the Republic Steel Corporation. The exhibit states that the tonnage shown therein moved from various Ohio coal producing districts which we must presume moved principally from the districts covered by the complaint:

	Year 1928	Year 1929	Year 1930
Total tons of coal shipped	499,155 tons	507,331 tons	534,710 tons
Total tons of coal received by Republic Steel Corporation	266,894 tons	214,380 tons	244,302 tons
Percentage of total tonnage received by Republic Steel Corporation	53.5%	42.3%	45.7%

The total tonnage figures shown for these periods are somewhat at variance with those given by the defendants in their exhibit 53 as follows:

	1928	1929	1930
Total	498,674 tons	479,437 tons	442,748 tons

In attempting to make comparisons with similar data, presented by parties of record difficulty has been experienced due to different methods of computation, different periods of time and indefinite statements. Defendants' exhibits 41, 42 and 43 have little probative value as they are not susceptible of check. Mileages from origin points from which rates are not under attack, have been consolidated with districts, from which rates are assailed. Individual mileages from each active mine are absent and only the total mileage from all mines are shown. Complainant's exhibits in this respect are more complete and comprehensive.

Consideration of group relationship is of importance in determining any adjustment within a district where the general level of rates is determined upon related differentials. However, with respect to the rates herein involved, no differentials have ever been fixed by any regulatory body from the Middle, Massillon and Number 8 districts to Canton or Massillon. At present there is a difference in the prevailing rates from the Number 8 and Middle districts of 25 cents, but this difference has not ben consistently maintained between the two groups, as indicated in exhibits of record which purport to show the chronological histories of the rates. Complainant introduced one exhibit showing the history of the rates to Canton from the Middle, Massillon and Number 8 districts for the period September 1, 1909 to date. This shows that the group rates from both the Middle and Massillon districts to Canton have been on a parity during this period of time. However, the differences between the prevailing rates from these two districts and the Number 8 district have varied at different periods reflecting differences of 20 cents, 25 cents and 28 cents. This exhibit shows by the various changes in rates made since the year 1909, that greater percentage increases exist in the rates from the Massillon, Middle and Number 8 districts than from the Pittsburgh, Connellsville and Fairmont districts. As illustrative, during this period from September 1, 1909, to date, the percentage increase from the Middle and Massillon districts to Canton has been 152.5%, and from the Number 8 district 93.8%, while the percent of increase from the Pittsburgh district has been 67.4%, Connellsville 50%, and Fairmont 65.5%. We have held in previous cases, that a comparison of the percentage of increase in a short-haul rate with a long-haul rate proves

[fol. 85] nothing in so far as the intrinsic reasonableness of either rate is concerned.

It is true that there are rates from a number of mines in these districts both higher and lower than the prevailing group rates from certain mines and over certain routes. The relationship is not maintained with the same consistency in these short hauls as in the longer hauls, and this is also found in the application of the rates applying from nearby points in the groups to short haul destinations, as there are usually some circuitous routes necessitating special consideration, which is likewise true of producing mines located just outside of the switching limits of nearby consuming centers. These, among other reasons, contribute to exceptions in the general level of group rates to short haul points. It is difficult to believe however, that rates in excess of the prevailing group rate, applying on coal of similar quality and used for a like purpose, would influence the movement of but little tonnage, and in our opinion little consideration need be given to such rates or the mileages over the circuitous routes via which they apply, in fact, the defendants admitted that these higher rates are merely paper rates. Carriers are entittled to rates that will compensate them for the quantum of service they are called upon to perform, but rates that have been constructed by the inclusion of services that are seldom performed, reflect rates that are not justified. Unduly circuitous routes, traversed by single lines, where reasonable joint routes could be used must also be condemned. Carriers are called upon to perform an average amount of transportation, but there is no justification for basing average services upon unduly circuitous routes for this contributes to a waste of transportation and is not conducive to reasonable or just rates. If mileages over circuitous joint routes that carry with them higher rates, or mileages over circuitous single line routes, were included to compute an average haul for use in prescribing a group rate, then the majority of the mines operating within the group, would have reflected in their rates an amount for transportation not justified under the circumstances.

Section 15, paragraph 4, of the Interstate Commerce Act, provides that no carrier can be compelled, without its consent, to participate in a joint rate, over a route, which embraces substantially less than the entire length of its railroad between termini. However, there is no such statutory

provision in the General Code of Ohio, similar to the said provision of the Interstate Commerce Act. In this state, the law does not guarantee to a carrier its long haul, whether it be the initial, intermediate, or the delivering carrier, and manifestly we are not bound by a statute that applies only to Interstate Commerce. It is the view of the Commission that freight traffic should ordinarily move over the shortest reasonable routes and therefore distances for rate-making purposes should, in most cases, be figured over the shortest reasonable routes over which shipments can be made without transfer of lading, although we would not usurp a carrier's discretion to move shipments over a route which it has demonstrated to be the most economical, provided the rate is reasonable and otherwise lawful.

Considerable testimony was adduced as to methods employed in arriving at the existing rates, various rate histories, the relationship of the groups herein involved with other groups, etc. Massillon and Canton are located in unaffected territory or, as stated by defendants, in territory known as "No Man's Land." The term "unaffected territory" is used to differentiate between the territory herein under consideration and "affected territory" to which the Interstate Commission prescribed certain differentials in Ohio-Michigan Coal Cases, 80 I. C. C. 663.

In the following tables will be found a list of the active mines in the Middle-Coshocton and Number 8 coal producing districts as listed in exhibits of record. Opposite each mine location is shown the short tariff route distance; the short line distance; the routes over which the mileages were computed, together with the present prevailing rates applying therefrom. Much of this data has been taken from complainant's exhibits, although some of the mileages were taken from carriers' distance tariffs on file with the Commission. Reasons for the use of defendants' exhibits for list of active mines and complainants' exhibits for distances have been heretofore explained. The tables portray the existing situations in these districts:

[fol. 86]

Table B

From active mines in the Middle-Coshocton districts listed in defendants' Exhibit No. 40		To Canton					To Massillon				
		Short tariff route distance			Short line distance		Short tariff route distance			Short line distance	
Name of mine	Location	Miles	Rate	Route	Miles	Route	Miles	Rate	Route	Miles	Route
Baltimore and Ohio Railroad											
Laurel Valley	Stillwater	43.6	101	2	43.6	2	40.4	101	2	40.4	2
Maple Leaf	Newport	39.8	101	2	39.8	2	36.6	101	2	36.6	2
Walnut Grove (Newport)	"	39.8	101	2	39.8	2	36.6	101	2	36.6	2
Midvale No. 4	Midvale	34.2	101	2	34.2	2	31.0	101	2	31.0	2
B No. 1	"	34.2	101	2	34.2	2	31.0	101	2	31.0	2
Wainwright No. 6-7	"	34.2	101	2	34.2	2	31.0	101	2	31.0	2
Penco (Sharon Valley No. 1)	"	34.2	101	2	34.2	2	31.0	101	2	31.0	2
Silver Creek No. 2	Goshen	32.1	101	2	32.1	2	28.9	101	2	28.9	2
Brandywine Valley (Wentz-Ankeny)	Dover	24.8	101	2	24.8	2	21.6	101	2	21.6	2
Staffstead	Uhrichsville	37.5	101	2	37.5	2	34.3	101	2	34.3	2
Blackoak No. 2 (Fas-Run)	North Industry	4.3	76	2	4.3	2	12.5	101	4	12.5	4
Clover Leaf	Mineral City	15.0	101	2	15.0	2	23.2	101	4	23.2	4
Crystal	" "	15.0	101	2	15.0	2	23.2	101	4	23.2	4
Stone House	" "	15.0	101	2	15.0	2	23.2	101	4	23.2	4
14 mines total miles		403.7			403.7		404.5			404.5	
Average miles		28.8			28.8		28.9			28.9	
New York Central Railroad											
Ohio & Penna. Coal Co. No.	Bergholz	38.5	113	6	38.5	6	59.5	113	6	46.7	7
Warner-Collieries (Wolf Run)	"	38.5	113	6	38.5	6	59.5	113	6	46.7	7
Rail & Lake Coal Mining Co.	"	38.5	113	6	38.5	6	59.5	113	6	46.7	7

Ohio & Penna. Coal Co. No. 2	Amsterdam	42.6	113	6	42.6	6	63.6	113	6	50.8	7
Y. & O. Coal Co. No. 2	"	42.6	113	6	42.6	6	63.6	113	6	50.8	7
5 Mines total miles		200.7			200.7		305.7			241.7	
Average miles		40.1			40.1		61.1			48.3	

[fol. 87] Pennsylvania Railroad

Columbia	Salineville	36.8	101	1	36.8	1	45.0	101	1	45.0	1
Grant	Salineville	36.8	101	1	36.8	1	45.0	101	1	45.0	1
Strabley No. 1	"	36.8	101	1	36.8	1	45.0	101	1	45.0	1
Carroll	"	36.8	101	1	36.8	1	45.0	101	1	45.0	1
Walters	"	36.8	101	1	36.8	1	45.0	101	1	45.0	1
Sterling	"	36.8	101	1	36.8	1	45.0	101	1	45.0	1
McCartney	Kensington	31.5	101	1	31.5	1	39.7	101	1	39.7	1
Brown & Son	Rosswell (1)	32.6	101	12	32.6	12	36.6	101	9	30.5	10
Oak Hill	" (1)	32.6	101	12	32.6	12	36.6	101	9	30.5	10
Reeves No. 3	" (1)	32.6	101	12	32.6	12	36.6	101	9	30.5	10
Brown	" (1)	32.6	101	12	32.6	12	36.6	101	9	30.5	10
Goshen Central	" (1)	32.6	101	12	32.6	12	36.6	101	9	30.5	10
Vicks	" (1)	32.6	101	12	32.6	12	36.6	101	9	30.5	10
Beaver Dam	" (1)	32.6	101	12	32.6	12	36.6	101	9	30.5	10
Green Ridge	" (1)	32.6	101	12	32.6	12	36.6	101	9	30.5	10
Job	New Philadelphia	28.4	101	2	28.4	2	25.2	101	2	25.2	2
Walters	Kimbolton	59.1	101	12	59.1	12(2)	55.9	101	10	55.9	10
Tyrone	Cannel Spur	72.0	126	1	65.3	11	63.8	126	1	58.3	11
Meechan	Philadelphia Roads (3)	43.7	101	8	43.7	8(4)	39.6	101	8	39.6	8
Edwards	" " (3)	43.7	101	8	43.7	8(4)	39.6	101	8	39.6	8
Franklin No. 2	Conesville (5)	61.0	101	3	61.0	3(6)	54.0	101	3	54.0	3
21 mines total miles		821.0			814.3		880.6			826.3	
Average miles		39.1			38.8		41.9			39.3	

(1) Short line distance used. Distance via tariff route of Penna. R. R. 56.5 miles.
(2) " " " " " " " " " " " 91.2 "
(3) " " " " " " " " " " " 100 "
(4) " " " " " " " " " " " 99 "
(5) Distance via Penna. R. R. 88 miles.
(6) " " " " 79 miles.

[fol. 88]

Table B

From active mines in the Middle-Coshocton districts listed in defendants' Exhibit No. 40		To Canton					To Massillon				
		Short tariff route distance			Short line distance		Short tariff route distance			Short line distance	
Name of mine	Location	Miles	Rate	Route	Miles	Route	Miles	Rate	Route	Miles	Route
		Wheeling and Lake Erie Railway									
Edgefield	Canton	..	101	..	..	..	8.2	101	1	82.2	1
Barnes No. 1	6 miles beyond Coshocton	60	101	3	60	3	53	101	3	53	3
" No. 2	6 miles beyond Coshocton	60	101	3	60	3	53	101	3	53	3
"	4 miles beyond Coshocton	58	101	3	58	3	51	101	3	51	3
Please	4 miles beyond Coshocton	58	101	3	58	3	51	101	3	51	3
Banks	2 miles beyond New Cumberland	24	101	5	24	5	28	101	3	28	3
Central Valley No. 3	2 miles beyond New Cumberland	24	101	5	24	5	28	101	3	28	3
" " No. 4	2 miles beyond New Cumberland	24	101	5	24	5	28	101	3	28	3
Tabor Hollow	2 miles beyond New Cumberland	24	101	5	24	5	28	101	3	28	3
Finzer	Sugar Creek	31	101	3	31	3	24	101	3	24	3
Wilkins	Sherrodsville	28	101	5	28	5	32	101	3	32	3
Sherrodsville	"	28	101	5	28	5	32	101	3	32	3
Strobley	1 mile beyond Dell Roy	36	101	3	36	3	41	101	3	41	3
Merrick	1 mile beyond Dell Roy	36	101	3	36	3	41	101	3	41	3
14 miles total miles		491			491		498.2			498.2	
Average miles		35			35		35.6			35.6	

* Wheeling and Lake Erie switching rate of 38¢ per ton applicable to deliveries on the Wheeling and Lake Erie at Canton. This rate is not at issue here.

Grand Total

Table B

54 mines total miles	1916.4	1909.7	2089.	1970.7
Average miles	35.5	35.4	38.7	36.5

Routes From Middle-Coshocton Districts—Table B

Route 1 Pennsylvania Railroad.
" 2 Baltimore and Ohio Railroad.
" 3 Wheeling and Lake Erie Railway.
" 4 Baltimore and Ohio Railroad, Canton, Pennsylvania Railroad.
" 5 Baltimore and Ohio Railroad, Valley Junction, Wheeling and Lake Erie Railway.
" 6 New York Central Railroad, Minerva, Wheeling and Lake Erie Railway.
" 7 New York Central Railroad, Minerva, Wheeling and Lake Erie Railway, Canton, Pennsylvania Railroad.
" 8 Pennsylvania Railroad, Uhrichsville, Baltimore and Ohio Railroad.
" 9 Pennsylvania Railroad, Valley Junction, Wheeling and Lake Erie Railway.
" 10 Pennsylvania Railroad, Dover, Baltimore and Ohio Railroad.
" 11 Pennsylvania Railroad, Coshocton, Wheeling and Lake Erie Railway.
" 12 Pennsylvania Railroad, Valley Junction, Baltimore and Ohio Railroad.

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Table C

From active mines in the No. 8 districts listed in defendant's Exhibit No. 40		To Canton					To Massillon				
		Short tariff route distance			Short line distance		Short tariff route distance			Short line distance	
Name of mine	Location	Miles	Rate	Route	Miles	Route	Miles	Rate	Route	Miles	Route
		Wheeling and Lake Erie									
Hazel	East Cadiz	51	126	9	51	9	55	126	3	55	3
Rose	3 miles beyond Hurford	60	126	9	60	9	64	126	3	64	3
Tasa	3 miles beyond Hurford	60	126	9	60	9	64	126	3	64	3
Maple Grove	1 mile beyond Adena	59	126	9	59	9	63	126	3	63	3
Stellar	Robyville	60	126	9	60	9	54	126	3	64	3
Bellevue	2 miles beyond Hurford	59	126	9	59	9	63	126	3	63	3
Penova No. 2	Kenwood	55	126	9	55	9	59	126	3	59	3
Wheeling Township No. 2	5 miles beyond Adena	63	126	9	63	9	67	126	3	67	3
Felka	Dillonvale	65	126	9	65	9	69	126	3	69	3
Bethel	Maynard	67	126	9	67	9	71	126	3	71	3
Adena	Adena	58	126	9	58	9	62	126	3	62	3
Chamberlain	Dillonvale	65	126	9	65	9	69	126	3	69	3
Nicholson No. 2	2 miles beyond Dillonvale	67	126	9	67	9	71	126	3	71	3
Bainbridge	Herrick	61	126	9	61	9	65	126	3	65	3
Dillon No. 1	2 miles beyond Herrick	63	126	9	63	9	67	126	3	67	3
Dorothy	Connor	70	126	9	70	9	74	126	3	74	3
Rexford	Rexford	50	126	9	50	9	54	126	3	54	3
Theresa	Kenwood	55	126	9	55	9	59	126	3	59	3
Cadiz Block	2 miles beyond Rexford	53	126	9	53	9	57	126	3	57	3

Nelms No. 4	2 miles beyond East Cadiz	53	126	9	53	9	57	126	3	57	3
Bidwell	8 miles beyond Adena	66	126	9	66	9	70	126	3	70	3
Clarkson	Clarkson	70	126	9	70	9	74	126	3	74	3
Shadyside	Terminal Jct.	77	126	9	77	9	81	126	3	81	3
Ohio and West Virginia	" "	77	126	9	77	9	81	126	3	81	3
Philadelphia and Cleveland Coal Company	" "	77	126	9	77	9	81	126	3	81	3
25 mines total miles		1561			1561		1661			1661	
Average miles		62.4			62.4		66.4			66.4	

[fol. 90]

Pennsylvania Railroad

Castern	Steubenville	65.7	126	1	65.7	1	73.9	126	1	73.9	1
Henrietta	Brilliant	72.1	126	1	72.1	1	80.3	126	1	80.3	1
Dorothy	Rayland	79.6	126	1	79.6	1	87.8	126	1	87.8	1
Russell	Tiltonville	80.8	126	1	80.8	1	89.0	126	1	87.7	14
Walnut Hill (Yorkville)	Yorkville	81.7	126	1	81.7	1	89.9	126	1	86.8	14
Gaylord	C. & P. Junction	85.0	126	1	80	12	94	126	1	84.8	14
Florence	Martin's Ferry	86.5	126	1	78	9	94.7	126	1	82	3
Nina	" "	86.5	126	1	78	9	94.7	126	1	82	3
Sheets	" "	86.5	126	1	78	9	94.7	126	1	82	3
Aetna-Standard	Bridgeport	88.3	126	1	81	9	96.5	126	1	85	3
Rail & River No. 4	Shadyside	97.0	126	1	88	12	105.0	126	1	92.0	14
Webb	Webb	98.0	126	1	89.8	12	106.5	126	1	93.8	14
Powhatan	Powhatan	107.0	126	1	98.8	12	115.5	126	1	102.8	14
Coxe	Fernwood	76.0	126	1	62.4	13	84.0	126	1	66.4	15
Copeton	Folks	91.0	126	1	51.5	13	99.0	126	1	55.5	15
Narva	Narva	93.0	126	1	52.9	13	101.0	126	1	56.9	15
16 mines total miles		1374.7			1218.3		1506.5			1299.7	
Average miles		85.9			76.1		94.1			81.2	

Table C

From active mines in the No. 8 districts listed in defendant's Exhibit No. 40		To Canton					To Massillon				
		Short tariff route distance			Short line distance		Short tariff route distance			Short line distance	
Name of mine	Location	Miles	Rate	Route	Miles	Route	Miles	Rate	Route	Miles	Route
Baltimore and Ohio Railroad											
St. Clairsville No. 8 District											
Schicks	Bellaire	98.1	126	2	84.6	10	94.9	126	2	88.6	11
Rail & River No. 6	Rail and River Mine No. 6	101.2	126	2	87.4	10	97.7	126	2	91.4	11
Dillon No. 7 (Neff No. 6)	Neffs	102.6	126	2	88.8	10	99.1	126	2	92.8	11
Bennett Run (Wolf)	Stewartsville	105.0	126	2	91.4	10	101.7	126	2	95.4	11
Rose	North Neff	103.2	126	2	89.4	10	99.7	126	2	93.4	11
Wheeling Creek No. 8 District											
Progressive	Bellaire	98.1	126	2	84.6	10	94.9	126	2	88.6	11
Blaine No. 3	Blaine	88.6	126	2	88.6	2	85.4	126	2	85.4	2
Stanley No. 4	"	88.6	126	2	86.6	2	85.4	126	2	85.4	2
Barton	Barton	85.2	126	2	85.2	2	82.0	126	2	82.0	2
Crescent No. 2	Crescent	83.3	126	2	83.3	2	80.1	126	2	80.1	2
Magy (Fairview	"	83.3	126	2	83.3	2	80.1	126	2	80.1	2
Little Pet (Maher No. 12)	Maynard	80.9	126	2	80.9	2	77.7	126	2	77.7	2
Crabapple No. 1	Fairpoint	76.6	126	2	76.6	2	73.4	126	2	73.4	2
" No. 2	"	76.6	126	2	76.6	2	73.4	126	2	73.4	2
Taplin	Bannock	73.1	126	2	73.1	2	69.9	126	2	69.9	2
Lydia	"	73.1	126	2	73.1	2	69.9	126	2	69.9	2
Alice	Flushing	66.8	126	2	66.8	2	63.6	126	2	63.6	2
Virginia 44-(Rosemary No. 3)	"	66.8	126	2	66.8	2	63.6	126	2	63.6	2
Dillon No. 6 (Pgh. Belmont No. 3)	Lafferty	70.7	126	2	70.7	2	67.5	126	2	67.5	2
Florence No. 1	Flushing	66.8	126	2	66.8	2	63.6	126	2	63.6	2
Virginia 34 (Rosemary No. 1-2)	"	66.8	126	2	66.8	2	63.6	126	2	63.6	2
21 mines total miles		1755.4			1673.4		1673.4			1649.4	
Average miles		83.6			79.7		80.3			78.5	

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From active mines in the No. 8 district listed in defendant's Exhibit No. 40

Name of mine	Location	To Canton: Short tariff route distance Miles	Rate	Route	To Canton: Short line distance Miles	Route	To Massillon: Short tariff route distance Miles	Rate	Route	To Massillon: Short line distance Miles	Route
		New York Central Railroad									
Crow Hollow No. 1	Bradley	68.5	126	6	68.5	6	89.5	126	6	72.6	8
Crow Hollow No. 2	Smithfield	70.3	126	6	70.3	6	91.3	126	6	74.1	8
Nicholson Mine	Dillonvale	65.2	126	6	65.2	6	86.2	126	6	69.0	3
Jefferson 1	Piney Fork	60.4	126	6	60.4	6	81.4	126	6	68.6	7
" 2	" "	60.4	126	6	60.4	6	81.4	126	6	68.6	7
Florence Coal Company	" "	60.4	126	6	60.4	6	81.4	126	6	68.6	7
Tasa Coal Co	Hopedale	54.3	126	6	54.3	6	75.3	126	6	62.5	7
Taylor Mine	Piney Fork	60.4	126	6	60.4	6	81.4	126	6	68.6	7
8 mines total miles		499.9			499.9		667.9			552.6	
Average miles		62.5			62.5		83.5			69.1	
		Pittsburgh and West Virginia Railway									
Rensi	Wayco	54.1	126	4	54.1	4	58.1	126	5	58.1	5
Superior	Chandler	57.5	126	4	57.5	4	61.5	126	5	61.5	5
Smithfield	Smithfield	60.4	126	4	60.4	4	64.4	126	5	64.4	5
Laudson	Hopedale	51.6	126	4	51.6	4	55.6	126	5	55.6	5
4 mines total miles		223.6			223.6		239.6			239.6	
Average miles		55.9			55.9		59.9			59.9	
		Grand Total Table C									
74 mines total miles		5414.6			5176.2		5762.			5402.3	
Average miles		73.2			69.9		77.9			73.	

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Routes from No. 8 Districts—Table C

Route 1 Pennsylvania Railroad.
" 2 Baltimore and Ohio Railroad.
" 3 Wheeling and Lake Erie Railway.
" 4 Pittsburgh and West Virginia Railway, Pittsburgh Junction, Wheeling and Lake Erie Railway, Valley Junction, Baltimore and Ohio Railroad.
" 5 Pittsburgh and West Virginia Railway, Pittsburgh Junction, Wheeling and Lake Erie Railway.
" 6 New York Central Railroad, Minerva, Wheeling and Lake Erie Railway.
" 7 New York Central Railroad, Minerva, Wheeling and Lake Erie Railway, Canton, Pennsylvania Railroad.
" 8 New York Central Railroad, Dillonvale, Wheeling, and Lake Erie Railway.
" 9 Wheeling and Lake Erie Railway, Valley Junction, Baltimore & Ohio Railroad.
" 10 Baltimore and Ohio Railroad, Terminal Junction, Wheeling and Lake Erie Railway, Valley Junction, Baltimore and Ohio Railroad.
" 11 Baltimore and Ohio Railroad, Terminal Junction, Wheeling and Lake Erie Railway.
" 12 Pennsylvania Railroad, Martin's Ferry, Wheeling and Lake Erie Railway, Valley Junction, Baltimore and Ohio Railroad.
" 13 Pennsylvania Railroad, Bowerston, Wheeling and Lake Erie Railway, Valley Junction, Baltimore and Ohio Railroad.
" 14 Pennsylvania Railroad, Martins Ferry, Wheeling and Lake Erie Railway.
" 15 Pennsylvania Railroad, Bowerston, Wheeling and Lake Erie Railway.

[fol. 93]

Reasonable Average Distances Reflected by Tables B and C

	To Canton	To Massillon
From Middle-Coshocton Districts	Reasonable short route tariff distances as revised by Commission	Reasonable short route tariff distances as revised by Commission
Averages	35.5 miles	38.7 miles
From No. 8 Districts		
Averages	73.2 miles	77.9 miles

From Middle-Coshocton Districts
To Canton and Massillon Combined
Average of reasonable short route tariff distances as revised by Commission
37.1 miles

From No 8 Districts
To Canton and Massillon Combined
Average of reasonable route tariff distances as revised by Commission
75.5 miles

In the foregoing Tables B and C, where mines are shown as being located certain distances beyond the billing station, such mileages have been added to the mileages from the station locations—all other mileages have been figured from the station at which the mine is located. The average distances shown above, in our opinion, should be used in determining the reasonableness or unreasonableness of the rates herein assailed.

The complainant introduced in evidence 9 decisions rendered by the Illinois Commerce Commission in dockets: 12069, 12615, 13128, 13213, 13510, 13572, 14166, 14584 and 14980, wherein rates were prescribed for the transportation of coal between points in Illinois on a much lower level, distance considered, than the rates herein assailed. The Illinois carriers appealed the said decisions to the Interstate Commerce Commission, under Section 13 of the Interstate Commerce Act, on the grounds that the rates prescribed by the Illinois Commission caused an undue and unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce on the one hand, and in interstate commerce on the other hand, and unjust discrimination against interstate commerce. The said case, before the Interstate Commerce Commission, is entitled, Intrastate Rates on Bituminous Coal between points in Illinois, Docket No. 23130. It was heard by said Commission in connection with other related cases and decision was rendered on March 8, 1932. In its decision, while increasing slightly the rates prescribed by the Illinois Commission, the Interstate Commission prescribed a scale of rates for intrastate application in Illinois for distances not exceeding 100 miles, on a much lower level than the rates herein assailed. The scale names a rate of 80 cents for distances of 31 to 40 miles inclusive and rate of 108 cents for distances of 71 to 80 miles inclusive. The entire scale will be shown later herein. In prescribing said scale the Interstate Commission said:

"In applying the foregoing scale distances shall be computed over the shortest tariff routes. The present origin groups may be continued, and so long as they are maintained without material change the rate from each such group shall be based on the average of the distances from all of the points in the group, computed in the manner described in the next preceding sentence."

In Coal Trade Association of Indiana vs. B. & O. R. R. et al., Interstate Commerce Commission, Docket No. 23922 (Sub-No. 2), decided May 31, 1932, involving rates on bituminous coal in carloads, from Indiana mines to destinations in eastern central Illinois, the Interstate Commerce again prescribed a scale of rates identical with the scale prescribed in Docket No. 23130, supra, except the scale is carried up to a distance of 300 miles. Distances between points, or average distances from groups under this scale, are to be com- [fol. 94] puted in similar manner as required under the scale prescribed in Docket 23130, supra, and the use of short tariff routes are required in arriving at average mileages, and not the average via all tariff routes. We concur in this opinion, as it harmonizes with our views, that where tariff mileages are unduly circuitous, mileages over reasonable, workable routes, should be substituted for rate-making purposes.

The defendants on brief ask the question: Why complainant has used, principally for comparative purposes, the coal rates applicable in Indiana and Illinois, and between Indiana and Illinois, rather than the Ohio intrastate rates close at home? The answer, according to complainant, is that the intrastate coal rates in Ohio are up on a plateau and unreasonably high; further that the rates in Indiana and Illinois are Commission-made rates and should be given more weight than the intrastate rates applicable generally in Ohio, which have not been before the Commission for determination as to their reasonableness. The record fails to show that there are any transportation conditions in Ohio which would warrant the maintenance or continuation of higher intrastate coal rates in Ohio than prevail in Indiana or Illinois or between Indiana and Illinois, for comparable distances.

The following table shows: What the rates would be for distances up to 100 miles on basis of the Holmes and Hallowell scale; 85% of the Holmes and Hallowell scale; rates prescribed in Intrastate Commerce Commission, Docket No. 23130, and rates that have been prescribed or approved by the Interstate Commerce Commission in various cases, for comparable distances:

[fol. 95]

Table D

(Rates in cents per net ton)

Distances	Holmes and Hallowell scale	85% Holmes and Hallowell scale	I. C. C. docket 23130 scale	Rates prescribed or approved by the Interstate Commerce Commission in various cases
30 miles and under	85	72	72 (a)	76(b)–80(c)
40 miles and over 30	94	80	80	80(d)
50 miles and over 40	102	87	87	90(e)–81.5(f)
60 " " " 50	111	94	94	95(g)
70 " " " 60	119	101	101	90(h)–100(i)
80 " " " 70	128	109	108	87(j)–110(k)–83(l)–110(m)
90 " " " 80	136	116	115	115(n)–96(o)–87(p)–90(q)–115(r)
100 " " " 90	145	123	122	93(s)–125(t)

(a) Distances 10 miles and under—60 cents.

(b) Distance 20 miles, Griff & MacKinville, Ind., to Illinois points 136 I. C. C. 543.

(c) Distance 24 miles, Newport, Indiana to Danville, Illinois, 152 I. C. C. 555.

(d) Distance 31 miles, Group 2 Illinois to E. St. Louis, Ill. 142 I. C. C. 95; 161 I. C. C. 371
Distance 33.9 miles Brazil-Clinton to Vermillion, Ill., 167 I. C. C. 294

(e) Distance 45 miles Brazil-Clinton to Ridge Farm, Ill., 152 I. C. C. 555

(f) Distance 46 miles Oakwood, Ill. to Crawfordsville, Ind. 157 I. C. C. 87; 173 I. C. C. 57

(g) Distances 57.4 and 54.7 miles Brazil-Clinton to Georgetown and Brewer, Ill. 152 I. C. C. 555

(h) Distance 62 miles Group 7, Illinois to E. St. Louis, Ill 142 I. C. C. 95; 161 I. C. C. 371

(i) Distance 70 miles Brazil-Clinton to Hoopeston, Ill., 132 I. C. C. 282

(j) Distance 71 miles Group 6, Illinois to E. St. Louis, Ill. 142 I. C. C. 95; 161 I. C. C. 371

(k) Distance 71.1 miles Linton-Sullivan to Georgetown, Ill., 152 I. C. C. 555

(l) Distance 73 miles Group 5, Illinois to E. St. Louis, Ill. 142 I. C. C. 95; 161 I. C. C. 371

(m) Distance 78 miles Brazil-Clinton to Fithian, Ill., 153 I. C. C. 317

(n) Distance 81.6 miles Linton-Sullivan to Danville, Ill., 152 I. C. C. 555

(o) Distance 82 miles Group 9, Illinois to E. St. Louis, Ill.
(p) Distance 86 miles Group 14, Illinois to E. St. Louis, Ill.
(q) Distance 87 miles Group 8, Illinois to E. St. Louis, Ill.
142 I. C. C. 95; 161 I. C. C. 371

(r) Distance 87 miles Brazil-Clinton to St. Joseph, Ill., 153 I. C. C. 317.

(s) Distance 91 miles Group 15, Illinois to E. St. Louis, Ill. 142 I. C. C. 95; 161 I. C. C. 371

(t) Distance 94 miles Brazil-Clinton to Champaign, Ill.
Distance 98 miles Brazil-Clinton to Urbana, Ill.
153 I. C. C. 317

[fol. 96] Heretofore, in discussing the Holmes and Hallowell scale, we had in mind only the question of using the scale, as a guide, in establishing rates on certain percentages of said scale. In the instant case the record shows clearly that rates 100 per cent of the Holmes and Hallowell scale would be unreasonably high for application in the territory herein involved.

The defendants fear that if the assailed rates are reduced they will have the effect of causing reductions in the rates

from mines in the Cambridge district and elsewhere in Ohio. It is perhaps unnecessary to state that the fears of the defendants could afford no justification for the maintenance of unlawful rates. If it be affirmatively shown that the assailed rates are unjust and unreasonable, the fact that other rates may be affected is no reason for refraining from reducing the rates here under attack. In this connection we quote below from the report of the Interstate Commerce Commission in Ex Parte No. 103, dated October 16, 1931, 178 I. C. C. 539, at page 577:

"In addition to these pending revisions and others which are in progress on our docket, we believe that the traffic departments of the railroads should address themselves to the task of making such changes in the rates on particular kinds of traffic as will, in their judgment after careful analysis of all attendant circumstances, produce additional revenue and which can be supported as reasonable under existing conditions. This does not necessarily mean increases in rates. It is quite likely that there are now many rates which will produce more revenue if they are reduced, and we include in this category rates which we ourselves have prescribed as maxima. Some such rates have already been reduced, but we fear that there is at times a reluctance on the part of traffic officers, because of possible contingent effects, to cut below these rates even when they believe that the result would be to railroad advantage."

It may be good policy for the carriers, in times of depression, to reduce their rates on coal for the purpose of enabling the manufacturers on their lines to continue in business.

Coal is a low grade commodity; it loads to the capacity of the car; it moves regularly throughout the year and in trainload lots; it moves in open top cars and requires no expedited or special service; it cannot be damaged by weather conditions or by rough handling and claims for loss or damage are practically nil. In view of the foregoing, it would appear that coal is very desirable traffic, with which are connected substantially all the elements that go to make low freight rates proper.

The complainant has attacked all the rates from hte Massillon district to Canton and Massillon, which do not exceed 126 cents. The average distance from points in the Massillon district to Canton and Massillon, over the short tariff routes, is less than from the Middle-Coshocton districts to

the same destinations. The record shows that at present there is but one active mine in the Massillon district which is located at Brewster, Ohio, on the Wheeling and Lake Erie, 10 miles from Massillon and 17 miles from Canton.

We find that the assailed rates to Canton and Massillon are unjust and unreasonable to the extent they exceed the following:

(1) From Brewster (Massillon City No. 8 mine), 60 cents to Massillon and 72 cents to Canton;

(2) From North Industry (Black Oak mine No. 2), 60 cents to Canton and 80 cents to Massillon;

(3) From all mines and shipping points in the Massillon and Middle-Coshocton districts, except Brewster and North Industry, 80 cents;

(4) From all mines and shipping points in the Ohio No. 8 districts, 108 cents.

An appropriate order will be entered.

Defendants will be permitted to select the routes over which the reduced rates, herein prescribed, shall apply, with the understanding, however, that none of the assailed rates shall be increased which are applicable at present over the present existing tariff routes and further that no departures from the long-and-short-haul provision of Section 504-1 of the General Code of Ohio shall be created in the establishment of the rates herein prescribed.

[fol. 97] Order

AT A GENERAL SESSION OF THE PUBLIC UTILITIES COMMISSION OF OHIO HELD AT ITS OFFICE IN THE CITY OF COLUMBUS, OHIO, ON THE 30TH DAY OF JUNE, A. D., 1932

No. 7252

REPUBLIC STEEL CORPORATION

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, The Pennsylvania Railroad Company, The Pittsburgh and West Virginia Railway Company, and the Wheeling and Lake Erie Railway Company

This case being at issue, upon complaint and answers on file, and having been duly heard and submitted by the parties,

and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the above named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 1, 1932, and thereafter to abstain, from publishing, demanding or collecting rates for the transportation of bituminous coal in carload lots from mines and shipping points in the Massillon, Middle-Coshocton and Ohio No. 8 producing districts (as described in said report) to Canton and Massillon, Ohio, which exceed the rates prescribed in the next succeeding paragraphs hereof;

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 1, 1932, upon notice to this Commission and to the general public by not less than 3 days' filing and posting in the manner prescribed by law, and thereafter to maintain and apply to the transportation of bituminous coal, carloads, from mines and shipping points in the Massillon, Middle-Coshocton and Ohio No. 8 districts (as described in said report) to Canton and Massillon, Ohio, rates, in cents per net ton, which shall not exceed the following:

(1) From Brewster (Massillon City No. 8 mine), 60 cents to Massillon and 72 cents to Canton, Ohio;

(2) From North Industry (Black Oak Mine No. 2), 60 cents to Canton and 80 cents to Massillon, Ohio;

(3) From all mines and shipping points in the Massillon and Middle Coshocton districts, except Brewster and North Industry, 80 cents to Canton and Massillon, Ohio;

(4) From all mines and shipping points in the Ohio No. 8 districts, 108 cents to Canton and Massillon, Ohio;

It is further ordered, That to the rates prescribed herein may be added the temporary emergency charge of 6 cents per net ton as authorized in our order of December 29, 1931 in Docket No. 7245; and

It is further ordered, That the present existing rates on bituminous coal, carloads, from mines and shipping points

[fol. 98] in Massillon, Middle-Coshocton and Ohio No. 8 districts to Canton and Massillon, Ohio, which exceed 126 cents per net ton, shall not be affected by this order, except in so far as such rates may contravene the long-and-short-haul provision of Section 504-1 of the General Code of Ohio.

The Public Utilities Commission of Ohio, E. J. Hopple, Chairman; Frank W. Geiger, Commissioners.

A true copy:

Ira E. Sprankle, Superintendent of Investigation.
(Seal.)

[fol. 99] At a General Session of The Public Utilities Commission of Ohio Held at its Office in the City of Columbus, Ohio, on the 26th Day of July, A. D., 1932

No. 7252

Republic Steel Corporation

vs.

The Baltimore and Ohio Railroad Company et al.

Good cause appearing therefor,

It is ordered, That the order of June 30, 1932, in the above entitled proceeding, which, by its terms, was required to become effective August 1st, 1932, upon not less than three days' notice, be, and it is hereby, amended so as to require said order to be made effective on not less than one day's notice instead of three.

The Public Utilities Commission of Ohio, Frank W. Geiger, John W. Brinker, Commissioners.

A true copy:

Ira E. Sprankle, Superintendent of Investigation.
(Seal.)

[fol. 100] EXHIBIT D TO PETITION

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 7036

EMPIRE STEEL CORPORATION, Complainant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant

Submitted March 31, 1932. Decided July 25, 1932

Report of the Commission

Complainant is a corporation engaged in the manufacture of bars, sheets and other steel products. It owns and operates steel plants at Mansfield, Niles, Ashtabula and Cleveland, Ohio, with its principal office in the city of Mansfield, Ohio.

By complaint filed May 11, 1931, it alleges that the group [redacted]e published and charged by the defendant, for the transportation of bituminous coal, in carloads, from mines near Lore City, on the lines of the defendant carrier in the Cambridge district of Ohio, to Mansfield, Ohio, of $1.76 per net ton is excessive, unjust, unreasonable, unjustly discriminatory and unduly prejudicial. We are asked to prescribe a lawful rate for the future.

Hearing was begun on November 10, 1931 and, upon motion of the complainant, on said date, was continued for further hearing on January 19, 1932. Oral argument was had on March 31, 1932 and the case was submitted on that date. Mr. C. H. Henkel, Receiver of the Empire Steel Corporation, was substituted for the original complainant at the first hearing on November 10, 1931. The Mansfield Chamber of Commerce intervened in support of the complaint. The Pennsylvania Railroad; The New York Central Railroad; and The Pittsburgh and Lake Erie Railroad, companies, intervened in opposition to the complaint and in support of present adjustment.

Hereinafter, unless otherwise specified, rates will be stated in cents per ton of 2000 pounds, and where rates are shown herein, without mention being made of the commodity, they will be understood to represent rates on bituminous coal in

carload lots. They do not include the temporary emergency charge of 6 cents per net ton authorized by our order of December 29, 1931 in Docket No. 7245. The assailed rate and all other rates, from Ohio coal producing districts, hereinafter shown are published by F. V. Davis, Agent, in his local and joint freight tariff, Ohio No. 48, hereinafter referred to as the "Davis tariff". Various railroads will be referred to, at times, by their initials or customary abbreviated names. Whenever the word "interveners" is used herein, it will be understood to mean only the intervening railroads mentioned above.

Complainant operates open hearth furnaces, Bar mill and Sheet mills in Mansfield, and states, that it consumes a large tonnage of coal from mines near and in proximity of Lore City on the defendant's line in the Cambridge district; that it is in active competition with other plants in the same general territory in the manufacture and sale of like products; that the rate charged by the defendant is excessive and higher than rates charged by the defendant on the same commodity, under the same or similar circumstances, and for the same or greater distances; that the defendant and other carriers transport coal from the Cambridge district to Youngstown, Newton Falls, Warren and Niles, for distances more than 134 miles at a rate of 151 cents and that in all of said cities there are steel plants whose products are sold in competition with complainant's; that the steel industries in these said cities are given an unfair preference and advantage over the complainant and that the complainant is unjustly discriminated against to the extent that the group rate charged by defendant on coal, carloads, from mines on its lines in the Cambridge district to Mansfield exceeds 151 cents.

[fol. 101] The Cambridge district is situated in Southeastern Ohio and is served by the Pennsylvania and Baltimore and Ohio Railroads. It is bordered on the North by the Middle district; on the West by the Crooksville district; and the No. 8 district lies but a short distance Northeast of the Cambridge district. The Shawnee and Hocking districts are situated South of the Crooksville district and Southwest of the Cambridge district.

The complainant receives coal from the Cambridge, Middle, No. 8 and Crooksville districts, and, in the past, has secured some tonnage from the Shawnee and Hocking dis-

tricts, but they have no movement from those two latter districts at this time; in fact, coal production in the Shawnee district is exhausted and there has been no coal moving from that district for about 3 years. The record shows that for a period of 33 months, or from April 1, 1929 to January 1, 1932, the complainant received, at its Mansfield plants, 3,127 cars of coal, or an average of 95 cars per month, divided, as follows: 1,003 cars from April 1st to December 31, 1929; 1,281 cars for the year 1930, and 843 cars for the year 1931. Of the total number of cars received, about one third originated in the Cambridge district, and the balance moved from other districts.

Complainant's Exhibit No. 11 shows rates, routes and the mileages applying from the Cambridge, Crooksville and Shawnee districts and the Northern portion of the Hocking district to Mansfield and other points. Rates of 151 cents and 164 cents apply from the Hocking district to Mansfield, rates of 151 cents applying from the Northern portion and 164 cents from the Southern portion. Hereinafter, when referring to the Hocking district, the Northern portion will be referred to as the "Northern Hocking district" and the Southern portion, the "Southern Hocking district." It is to be particularly noted that from the Cambridge, Crooksville, Shawnee and Northern Hocking districts, when routed over the line of the defendant, the rates are all equalized at Newark, Ohio, all rates to that point being 113 cents; to Mt. Vernon, the rates are again equalized from said districts, all rates being 139 cents; to Mansfield, the rate from the Crooksville, Shawnee and Northern Hocking districts is 151 cents, while the rate from the Cambridge district is 176 cents; to Shelby, Ohio, directly North of Mansfield, the rates from all 4 districts are again equalized, all rates being 176 cents. The record shows that the coal from the Cambridge, Crooksville and Northern Hocking districts is classified at Newark and the movement beyond Newark is the same regardless of point of origin.

The rates are equalized at points both North and South of Mansfield, while a difference of 25 cents exists at Mansfield from the Cambridge district compared with the Shawnee, Crooksville and Northern Hocking districts. The table below shows the rates and average mileage from these various districts to the 4 points heretofore men-

tioned, compiled from complainant's Exhibits Nos. 11 and 12.

From District	Origin Carrier	Rates: Newark	Rates: Mt. Vernon	Rates: Mansfield	Rates: Shelby	Average mileage: Newark	Average mileage: Mt. Vernon	Average mileage: Mansfield	Average mileage: Shelby
Cambridge	B. & O.	113	139	176	176	62	86	(2)126.1	135
"	P. R. R.	113	139	176	176	92	(1)100.7	(3)115.8	184
Shawnee	B. & O.	113	139	151	176	45	69	105.3	117
Northern Hocking	N. Y. C.	113	139	151	176	66	96	119.2	131
Crooksville	B. & O.								
	N. Y. C.								
	P. R. R.								
	W. & L. E.	113	139	151	176	42	70	(4)112.0	121

(1) Revised by Commission: Complainant shows an average of 169 miles, figured via Newcomerstown, Trinway and Columbus. Our mileage figured via Newcomerstown, Cochocton and Brinkhaven.
(2) Defendant's mileage: Complainant shows an average of 124 miles.
(3) Defendant's mileage: Complainant shows an average of 119 miles.
(4) Based on complainant's Exhibit 12. Defendant's Exhibit 20 shows 112.4 miles. Based on complainant's Exhibits 6 to 10, inclusive, the average appears to be 107.9 miles from 86 mines.

[fol. 102] The position of the defendant in this case is, that the rates from the Cambridge district to Mansfield should be 164 cents, or the same as the rates from the Southern Hocking district, and that the rates from the entire Hocking district should be 164 cents. The position of the defendant is bitterly opposed by the intervenors who seek the continuance of the present adjustment; also, the proposition of the defendant is not satisfactory to the complainant.

Defendant's Exhibits Nos. 21 and 22 are statements of rates, routes and average distances from mines in the Hocking, Crooksville and Cambridge districts to various points of destination. The following table is compiled from said exhibits:

From	To	Rate	Average distance
Cambridge district	Marion	164	169.0
Crooksville "	"	164	125.6
Hocking "	"	164	127.9
Cambridge "	Martel	164	155.3
Crooksville "	"	151	115.0
Crooksville "	"	164	128.3
Hocking "	"	164	140.3
Cambridge "	Edison	164	140.9
Hocking "	"	164	126.9
Cambridge "	Mt. Gilead	164	125.4
Hocking "	" "	164	136.7
Cambridge "	Shelby	176	133.9
Hocking "	"	176	139.9
Cambridge "	Plymouth	189	147.7
Hocking "	"	189	171.4
Cambridge "	Willard	189	151.4
Hocking "	"	189	168.6

The above comparisons were submited by the defendant, in an attempt to show that the rate from the Cambridge district to Mansfield should be 164 cents.

Average distances as computed by parties of record from the various districts to points of destination vary, due principally to the number of points selected, upon which to base such computations. Complainant, in arriving at its distances, claim to have used all points of origin within each district, as shown in the Davis tariff. Their exhibits contain a list of all such mines or stations which they used in arriving at their mileages applying from the Cambridge, Crooksville, Northern Hocking and Shawnee districts. Defendant's Exhibits do not give details upon which their mileages were based, except for the Cambridge district. In this exhibit, 11 mines on the defendant's line and 12 mines on the Penna. R. R. are used in the calculations. The 12 mines, used in arriving at the Penna. R. R. average mileage of 115.8 miles, include all mines shown in the Davis tariff. The 11 mines on defendant's line, used in arriving at the average of 126.1 miles, do not represent all of the mines listed in the Davis tariff; therefore, we must assume that such mines that have been omitted are inactive or have been abandoned. The Davis tariff gives a list of 31 mines on the defendant's line in the Cambridge district and based upon the use of the entire 31 mines, interveners arrive at an average distance of 122.7 miles to Mansfield. Interveners also claim that, via Penna. R. R. origins to Mansfield, the average mileage should be 121.8 miles and assert that the average for the entire Cambridge district to Mansfield is 122.5 miles. Interveners stress this difference in mileage; however, the average distance shown by the defendant from the Cambridge district of 120.7 miles closely approximates the average distances of 121.3 miles used by the complainant and 122.5 miles used by the interveners, the difference being so slight either could be used without any material changes in results. (For comparative purposes, we will use defendant's average of 120.7 miles from the combined Cambridge district to Mansfield; first, because the complainant's average mileage is improper, it being arrived at by using the mileages applying from both stations and mines listed in the Davis tariff, thus creating overlapping distances; second, because the interveners

simply assert that the average is 122.5 miles, arrived at by using all points shown in the Davis tariff, but did not offer any details in support of their assertion.)

[fol. 103] Interveners' Exhibit No. 30 is a map showing the Ohio No. 8, Cambridge, Pittsburgh and Connellsville origin groups as related to Mansfield. The present rate, from the Pittsburgh district, is 203 cents; from the Connellsville district, 209 cents; from the Ohio No. 8 district, 178 cents; and since May 12, 1930, the rate from the Cambridge district has been 176 cents. Prior to that time, it was the same as from the Ohio No. 8 district or 178 cents. The reduction of 2 cents was made from the Cambridge district to remove a violation of Section 504-1 G. C., in the existing rate to Shelby, Ohio, via the route of the Penna. and C. C. C. & St. L. Rys. Exhibit 27 shows that the Pittsburgh and Connellsville Groups are a part of the so-called "Inner Crescent". Pittsburgh, being the largest and oldest producing district in the Northern field, is used as the base group. The No. 8 district is 25 cents under Pittsburgh to Mansfield and the Connellsville rate 6 cents over Pittsburgh. The Cambridge district is treated for rate making purposes to many destinations, on a parity with the No. 8 district although this adjustment is not consistently held. Interveners, in Exhibit No. 34, cite several points to which rates are on a parity from the two districts, as follows:

Toledo, Ohio	189 cents	Cleveland, Ohio	174 cents
Wooster, Ohio	151 "	Alliance, Ohio	126 "
Canton, Ohio	126 "	Ashtabula, Ohio	184 "
Akron, Ohio,	151 "	Buffalo, N. Y.	224 "

Interveners offer this exhibit in an effort to show that the Cambridge and No. 8 districts enjoy equal rates to all important consuming points, and that this adjustment was made without strict observance of mileage and was designed to enable the Cambridge and No. 8 districts to compete on an equal basis at all important consuming points. By reference to complainant's Exhibits 14, 15, 16 and 17, rates and average mileages are shown from the Cambridge and No. 8 districts to Youngstown, Warren and Niles, at which points competitors of complainant are located. These exhibits show the following:

From	To	Rate	Average mileage
No. 8 district	Niles	134	90 to 155
	Warren	134	88 to 160
	Youngstown	134	98 to 164
Cambridge district	Niles—P. R. R.	144	130
	Niles—B. & O.	151	202
	Niles—B. & O. & P. R. R.	*147	166
	Warren—P. R. R.	144	135
	Warren—B. & O.	151	207
	Warren—B. & O. & P. R. R.	*147	171
	Youngstown—P. R. R.	144	139
	Youngstown—B. & O.	151	192
	Youngstown—B. & O. & P. R. R.	*147	165

*Average.

The foregoing table reflects a difference of 13 cents favorable to the No. 8 district as compared to the average rates applying from the Cambridge district.

It is pointed out, heretofore, that no tonnage is moving from the Cambridge district to Youngstown, Niles and Warren and this is no doubt brought about by the difference in rates applying from the No. 8, Pittsburgh and Connellsville districts in comparison with those contemporane- [fol. 104] ously in effect from the Cambridge district. The No. 8 and Pittsburgh district rates to Youngstown, Niles and Warren are 134 cents; the Connellsville rate 142 cents compared with a rate of 144 cents from the Cambridge district via the Penna. R. R. and a rate of 151 cents via the B. & O. R. R. to all 3 points. The rate from the No. 8 district to Youngstown via the B. & O. R. R. direct is 151 cents and applies through Warwick, Ohio. If the B. & O. reduced this rate to 134 cents to meet that of the Penna. R. R., it would, of necessity, have to reduce the rate from this district to Akron and other points. Therefore, it elects to meet the situation by publishing rates of 134 cents from the St. Clairsville No. 8 and Wheeling Creek No. 8 districts to Youngstown by routing this traffic through Dover and the Penna. R. R. While the allegation of the complainant, that rates applying from the Cambridge district to Youngstown are preferential of its competitors and place complainant at a disadvantage, may not be found to exist by the evidence adduced, nevertheless the participation of the defendant in rates of 134 cents from the No. 8 district to Youngstown as compared with rates of 176 cents from Cambridge district and 178 cents from No. 8 district to Mansfield clearly places complainant at a disadvantage and unduly prefers its competitors at Youngstown.

The record shows that the average mileage from the Cambridge district to Youngstown is 165 miles and that the rates are 144 cents via the Penna. R. R. and 151 cents via the B. & O. R. R. or the average rate is 147 cents. From the Cambridge district to Mansfield, the average mileage is 120.7 miles and the rate is 176 cents. From the No. 8 district to Youngstown, the rate is 134 cents and the average mileage is 118.1 miles, this mileage arrived at by taking an average of the average mileages shown in complainant's Exhibit No. 15, or by using carriers' own list of present active mines as offered in Republic Steel Corporation vs. B. & O. et al., P. U. C. O. Docket 7252, decided June 30, 1932, the average distance via short tariff routes is 120.2 miles from the No. 8 district to Youngstown. From the No. 8 district to Mansfield, the rate is 178 cents and the average mileage 157.2. It is noted that while the average mileages from the No. 8 district to Youngstown and from the Cambridge district to Mansfield are approximately equidistant, there is a difference in the rate favorable to Youngstown of 42 cents. The interveners stress the fact that from these districts to all important consuming centers, mileage has to a certain extent been disregarded in the publication of rates and that the present rates were influenced by shipper, carrier and market competition. This may be true but it is no answer to a charge of unjust discrimination or undue prejudice.

Interveners' Exhibit No. 38 is a map showing the geographical location of Mansfield and various producing coal districts, which has been presented for the purpose of showing the probable collateral effect of a reduction in the rate from the Cambridge district to Mansfield. In Republic Steel Corporation vs. B. & O. et al., supra, we said:

"The defendants fear that if the assailed rates are reduced they will have the effect of causing reductions in the rates from mines in the Cambridge district and elsewhere in Ohio. It is perhaps unnecessary to state that the fears of the defendants could afford no justification for the maintenance of unlawful rates. If it be affirmatively shown that the assailed rates are unjust and unreasonable, the fact that other rates may be affected is no reason for refraining from reducing the rates here under attack."

What we said there is applicable with equal force here.

Complainant's Exhibit No. 13 is a statement of rates applying to many selected destinations in Ohio from the Cambridge, Shawnee, Hocking and Crooksville districts and is intended to show points at which rates from these districts are equalized. The exhibit fails to show the average mileages from the origin groups and therefore is without probative value.

Interveners' Exhibits 29, 31, 35, 36, 41, 47, 50 and 52 are historical statements of rates on bituminous coal from various Ohio districts, as well as the Pittsburgh, and Connellsville districts to certain selected points in Ohio and present a comprehensive study of the various rate changes from these districts to the destinations selected, July 1, 1917 to date. These exhibits fail to convince us that the rate relationships shown therein are proper and further the value of the exhibits is impaired due to the fact that no average distances are shown from the various origin groups to the destinations—in fact no distances whatever are shown.

[fol. 105] Interveners' Exhibit No. 52 is a statement purporting to show history of the rates from various Ohio origin districts to Dayton, Ohio. It shows that the present rate is 183 cents from points on the B. & O. in the Cambridge, No. 8, Shawnee, Middle and Massillon, districts. Unconsciously, it may be, but none the less true, the compiler of the exhibit has selected the most distant producing districts in Ohio with respect to Dayton as a destination. The exhibit is without evidentiary value because it shows rates via only one carrier and fails to show any distances whatever.

Interveners' Exhibit No. 53 is a statement showing the coal tonnage shipped from all Ohio districts to Dayton during the years 1926 to 1930, inclusive, and the first 6 months of the year 1931. It shows that over 85 percent of the total tonnage was shipped from the Jackson County and Hocking districts. The exhibit shows that during the 18 month period ending with June 30, 1931, 30905 tons were shipped from the Jackson County district and 29373 tons from the Hocking district. The Jackson County district, is located Southwest of the Hocking district and is nearer Dayton than any other producing district in Ohio. Said district is served by the B. & O., D. T. & I. and C. & O. The Examiner ques-

tioned the witness, who introduced Exhibits Nos. 52 and 53, regarding the rates from the Jackson County district to Dayton and, after examining the applicable tariff, the witness stated that the rate was 151 cents from mines on the B. & O. and D. T. & I. and 176 cents from mines on the C. & O. His answer is not entirely correct as a rate of 170 cents also applies from mines on the C. & O. via certain routes, and a rate of 160 cents applies from certain mines on the B. & O. Under the circumstances, we feel that we should take cognizance of the lawful tariffs and distance tables on file with us and show the average rate and average distance from all mines and coal shipping points in the Jackson County district to Dayton. This we have done and the situation is reflected in the following tables No. 1, 2 and 3.

Table No. 1

Rates and Short Tariff Distances from All Mines and Shipping Points in the Jackson County District, on the B. & O., to Dayton for Movements over the B. & O. Direct; the Average Rate; Average Distance, and Average Rate Per Ton-Mile.

From	Rate	Miles	From	Rate	Miles
Canaanville	160	146.8	Mohawk	151	118.7
Athens	160	139.5	Superior No. 23	151	121.2
Luhrig	160	135.1	Superior No. 17	151	121.6
Mineral	160	129.7	" No. 20	151	121.8
Carbondale	160	134.6	Jackson	151	117.7
Zaloski	160	120.8	Clay	151	128.5
Ray	151	103.9	Oak Hill	151	130.5
Byers	151	101.5	Black Fork	151	135.8
Coalton	151	106.9	Roman	151	136.2
Glen Roy	151	108.7	Fire Brick	151	137.2
Ellston	151	111.9	Eifort	151	137.8
Capital	151	118.4	Bear Run	151	139.6
Clay products No. 3	151	118.4	Clare Switch	151	138.5
" " No. 1	151	118.9	Bloom Jct	151	140.9
" " No. 2	151	119.8	South Webster	151	143.1
" " No. 7	151	119.5			
Totals	2470	1934.4		2235	1969.1

	Rates	Miles	Rate per ton-mile
Grand totals	4705	3903.5	
Averages	151.7 cents	125.9 miles	1.21 cents

Authority for rates, Davis tariff, Ohio No. 48.
Authority for distances, B. & O. mileage tariff, Ohio No. WL 3317.

[ofl. 106] Table No. 2

Rates: Short Tariff Distances; Average Rate; Average Distance; and Average Rate Per Ton-Mile, from all Mines and Shipping Points in the Jackson County District, on the D. T. & I. to Dayton, via the Short Tariff Route.

From	Rate	Miles(1)	From	Rate	Miles(1)
Cove	151	113.4	Gold Camp	151	160
Old Sun Mine	151	114.6	Lisman	151	164
Jackson	151	121.2	Pedro	151	165.1
Herbert	151	146.1	Royersville	151	167.1
Hayward	151	148.9	Vesuvius	151	167.5
Afidre	151	149.9	La Grange	151	169.5
Cornwell	151	152.8	Ironton	151	173.3
Crawford	151	154.3	Lawrence	151	164.7
Superior	151	155.8	Bartles	151	166.2
Totals	1359	1257.0		1359	1497.4

	Rates	Miles	Rate per ton-mile
Grand totals	2718	2754.4	
Averages	151 cents	153 miles	.987 of a cent

(1) Route, via D. T. & I. to Washington C. H. and B. & O. beyond.
Authority for rates, Davis tariff Ohio 48.
Authority for distances, D. T. & I. tariff, Ohio 509 and B. & O. tariff, Ohio WL 3317.

Table No. 3

Rates: Distances over the Two Shortest Tariff Routes; Average Rate; Average Distance; and Average Rate Per Ton-Mile, from All Mines and Shipping Points in the Jackson County District, on the C. & O., to Dayton.

From	Rate	Miles	Route	Rate	Miles	Route
Hamdon	176	124.9	(a)	170	152.3	(b)
Jackson	176	120.9	(a)	170	162.4	(b)
Dundas	176	119.9	(a)	170	147.8	(b)
McArthur	176	122.9	(a)	170	145.0	(b)
Orland	176	132.9	(a)	170	134.8	(b)
Oreton	176	125.4	(a)	170	153.3	(b)
Radcliff	176	127.9	(a)	170	155.9	(b)
Hawks	176	130.9	(a)	170	158.2	(b)
Clarion	176	133.9	(a)	170	160.3	(b)
Minerton	176	134.9	(a)	170	162.1	(b)
Vinton	176	141.9	(a)	170	170.0	(b)
Totals	1936	1416.4		1807	1702.1	

	Rates	Miles	Rate per ton-mile
Grand totals	3806	3118.5	
Averages	173 cents	141.7 miles	1.22 cents

(a) Route, via C. & O. to Wellston and B. & O. beyond.
(b) Route, via C. & O. to Columbus and Big Four beyond.
Authority for rates, Davis tariff, Ohio 48.
Authority for distances, C. & O. tariff, Ohio 1476 and Big Four tariff, Ohio 2755.

Recapitulation, Tables Nos. 1, 2 and 3

	71 Rates	71 Distances	Rate per ton-mile
Great grand totals	11229	9776.4	
Averages	158.2 cents	137.7 miles	1.15 cents

Consideration of the foregoing recapitulation leads us to the opinion that there is merit in complainant's contention that the group rate from the Cambridge district to Mansfield should not exceed 151 cents.

[fol. 107] Interveners' Exhibits Nos. 54 and 55 are statements showing rates, average distances and per ton mile earnings from the Cambridge, Jackson County, Hocking and Crooksville districts to 28 selected points of destination compared with the present rate of 176 cents from the Cambridge district to Mansfield and the ton mile earnings thereunder. 13 of the rates used for comparative purposes apply to points in affected territory in Northwestern Ohio which are, in railroad parlance, "frozen rates" because of the absolute differentials prescribed by the Interstate Commerce Commission in Ohio-Michigan Coal Cases, 80 I. C. C. 663; 8 of the selected destinations are small villages where the consumption of coal would, of necessity, be very small. All of the rates shown in the exhibits are amongst the highest rates published for the movement of coal in the state of Ohio. The exhibits show that the compared rates and ton mile earnings thereunder are generally on a somewhat higher level than the rate herein assailed. The record shows that the defendant and other carriers publish and maintain a rate of 142 cents from mines and coal shipping points in the Connellsville district to Youngstown for an average distance of 132 miles. The defendant moves coal from Connellsville district to Youngstown direct over its own rails and, as heretofore shown, coal moves over the defendant's line direct from the Cambridge district to Mansfield at rate of 176 cents for average distance of 120.7 miles. We have no jurisdiction over interstate rates, and the Interstate Commerce Commission is without authority to grant relief where the interstate rates are unjustly discriminatory against intrastate commerce and unduly preferential of interstate commerce. In Mutual Creamery Company vs. American Railway Express Company, et al., 132 I. C. C. 207, the Interstate Commerce Commission said, at Page 212:

"The Interstate Commerce Commission Act should not be broadly construed to empower this Commission to take action against rate adjustments for purposes which are primarily of intrastate concern and are not essential to the proper regulation of either interstate or foreign commerce.

Our conclusion is that an issue of undue prejudice to intrastate commerce and undue preference of interstate commerce, and of unjust discrimination against intrastate commerce, is not within the purview of the Act we administer, and we so find."

Also, in view of the foregoing, the following would appear to be appropriate:

"When the interstate freight rates put into effect by the Interstate Commerce Commission are materially lower for the same length of haul on the same class of commodities than the intrastate rates made under the orders of the Corporation Commission, this constitutes such a discrimination that it is the duty of the Corporation Commission to remove it by readjusting the rates." Atchison, T. & S. F. Ry. Co. v. State (Okla. 1922), 296, Pac. 236.

In the case of The Ohio Farm Bureau Federation, et al., vs. Akron and Barberton Belt Railroad Company, et al., Docket 5402, decided March 12, 1929, we said:

"'Our power arises under Sections 535 and 567 of the General Code of Ohio and those sections do not limit us to the consideration of state rates only. Therefore, the limitations upon our power, if any exist, must be found elsewhere. We are limited in that we may not make an order which directly or indirectly regulates the rates and charges for interstate transportation and we may not prescribe a rate which violates the 14th amendment of the United States Constitution. We have already considered the matter of confiscation and, inasmuch as we have no evidence in the record in any way establishing the claim that rates sufficiently low to remove existing prejudice are confiscatory, and particularly in view of the fact that the rate level which results in discrimination and prejudice has been prescribed by the Interstate Commerce Commission and is now in effect, that limitation on our authority does not come into play in the instant case. Our conclusion is that an issue of undue prejudice to intrastate commerce and undue preference of interstate commerce, and of unjust discrimination against intrastate commerce, subject to the limitations above mentioned, falls within the purview of the laws we administer, and we so find."

[fol. 108] Therefore, it appears that the present adjustment is prejudicial to the complainant and preferential of its competitors at Youngstown.

The following table compiled from exhibits of record shows present rates and ton mile earnings thereunder from various origin districts to various destinations in Ohio compared with the present rate of 176 cents and the proposed rate of 151 cents, and ton mile earnings thereunder from the Cambridge district to Mansfield.

From Origin Districts	To	Rate	Average distance (miles)	Average rate per ton per mile (cents)
Cambridge (B. & O.)	Mansfield	176	126.1	1.39
" (P. R. R.)	"	176	115.8	1.52
" (Combined)	"	176	120.7	1.45
" "	"	151#	120.7	1.24
Northern Hocking	Mansfield	151	119.2	1.26
Southern "	"	164	154.0	1.00
Crooksville	"	151	112.0	1.34
No. 8	"	178	157.2	1.13
Cambridge (B. & O.)	Youngstown	151	192.0	0.78
" (P. R. R.)	"	144	139.0	1.03
" (Combined)	"	147*	165.0	0.89
Connellsville	"	142	132.0	1.07
St. Clairsville No. (B. & O.)	"	134	164.0	0.81
Wheeling Creek No. 8 (B. & O.)	"	134	129.0	1.03
No. 8 (W. & L. E.)	"	134	119.0	1.12
No. 8 (N. Y. C.)	"	134	98.0	1.36
No. 8 (P. & W. Va.)	"	134	112.0	1.19
Pittsburgh No. 8 Ohio (IV group) (P. R. R.)	"	134	101.0	1.32
Pittsburgh No. 8 Ohio (IW group) (P. R. R.)	"	134	104.0	1.28
No. 8 (Combined)	"	134	118.1(b)	1.13
No. 8 "	"	134	120.2(a)	1.11
Cambridge (P. R. R.)	Warren	144	135.0	1.06
" (B. & O.)	"	151	207.0	0.72
No. 8	"	134	117.3	1.14
Cambridge (P. R. R.)	Niles	144	130.0	1.10
" (B. & O.)	"	151	202.0	0.74
No. 8	"	134	113.1	1.18
Cambridge (P. R. R.)	Wooster	151	121.0	1.24
" (B. & O.)	"	151	192.6	0.78
" (Combined)	Cleveland	174	199.0*	0.87
" "	Canton	132*	119.0	1.10
" "	Ashtabula	184	220.0	0.83
" "	Massillon	126	136.0	0.92
" "	Newton Falls	151	203.0	0.74

Proposed.
* Average rate.
(a) Based on mileage from active mines furnished by carriers in Republic Steel Corporation vs. B. & O., et al., P. U. C. O. Docket No. 7252.
(b) Average of average distances, complainant's Exhibit No. 15.

Analyzing the rates, average distances and ton mile earnings as shown in the foregoing table, it is our opinion that they go far toward justifying the rate sought by the

complainant of 151 cents from the Cambridge district to Mansfield.

[fol. 109] The interveners stress particularly certain rate relationships and differentials. There is a large coal consuming area, known as "affected territory", consisting of that portion of Central Freight Association territory embraced in the Northwestern quarter of Ohio, the Northeastern quarter of Indiana; and the entire lower peninsula of Michigan. It is bounded by an irregular line, extending from a point just East of Sandusky, Ohio, passing South through Galion, Ohio; thence Southwesterly North of Marion, Springfield and Dayton, Ohio to the Ohio-Indiana State line; Westerly North of Indianapolis, Ind.; Northly West of La Fayette and South Bend, Ind., to a point on the Indiana-Michigan State line; and thence Westerly to Lake Michigan at a point just East of Michigan City, Ind. Ohio coal comes into keen competition with coal produced in the so-called "Inner and Outer Crescents". The principal origin districts in the Inner Crescent are:

Pittsburgh and Connellsville districts in Western Pennsylvania;

Fairmont and Kanawha districts in West Virginia;

Kenova-Thacker district lying partly in West Virginia and partly in Kentucky;

Elkhorn district in Eastern Kentucky; and

Jellico district lying in Eastern Kentucky and Eastern Tennessee.

The principal origin districts in the Outer Crescent are:

Meyersdale district in Pennsylvania;

Cumberland-Piedmont District in Maryland and West Virginia;

New River and Pocahontas districts in West Virginia;

Clinch Valley district in Virginia; and

Stonega district in Southwestern Virginia and Eastern Kentucky.

The only differentials, present or past, affecting any Ohio intrastate coal rates, which have been prescribed by any regulatory authority, are those prescribed by the Interstate Commerce Commission between the Inner and Outer Crescents on the one hand and the Southern Ohio districts on the other hand on coal shipped from the Southern Ohio

districts to that part of affected territory located in the Northwestern quarter of Ohio, as previously described. We show, immediately following a history of these various differential adjustments:

Rates from the producing districts to affected territory are made upon the "group principle, both as to origins and destinations. As between the Ohio, Inner Crescent, and Outer Crescent districts, the rates from each bear an important relation to the rates from the others. For more than twenty-five years prior to the year 1917, the rates from the Ohio districts to points in affected territory were differentially lower by 25 cents per ton than the rates from the Inner Crescent and 40 cents differentially lower than from the Outer Crescent. Those differentials were fixed by agreement of the carriers themselves after many rate wars. In Bituminous Coal to Central Freight Association territory, 46 I. C. C. 66, hereinafter referred to as the "C. F. A. Case", decided July 13, 1917, the Interstate Commerce Commission found that the differentials, previously mentioned, were too low and ordered them increased to 40 and 60 cents, respectively. This was accomplished by increasing the rates from the Inner Crescent by 15 cents and from the Outer Crescent by 20 cents. In the same proceeding, the Interstate Commission found that the then existing rates from the Ohio districts to affected territory were not unreasonable. However, before the decision in the C. F. A. Case was announced, a separate general increase of 15 cents per ton was permitted in the rates from all the districts, following decision of the Interstate Commission in Ex Parte 57 (45 I. C. C. 330). Thus the rates prescribed in the C. F. A. Case were never as such established, but such rates plus the general increase were made effective August 30, 1917. On June 25, 1918, during the period of Federal control, the rates from the Ohio and Crescent districts were increased under a General Order No. 28 of the Director General of Railroads by certain specific amounts; for instance, the rates to Toledo, Ohio, were increased uniformly by 35 cents per ton from all the producing districts. This adjustment, while preserving the then existing differentials of 40 and 60 cents, had the effect of increasing the rates from the Ohio districts by a greater percentage than from the Crescents. After the termination of Federal control, during the reconstruction period, both the Inter-

state Commerce Commission and this Commission authorized the carriers to increase all of their rates forty per cent, effective August 26, 1920. In making these increases to affected territory and for the purpose of maintaining the differentials of 40 and 60 cents, the carriers filed schedules proposing to increase the rates from the Inner Crescent 40 per cent; from the Outer Crescent 20 cents over the in- [fol. 110] creased rates from the Inner Crescent; and from the Ohio districts, 40 cents per ton under the increased rates from the Inner Crescent. By this process, the rates from the Ohio districts were increased more than 40 per cent, while the rates from the Outer Crescent were increased less than forty per cent. However, the Ohio intrastate rates were not permitted to be increased in the manner described for, upon protests filed by many interested parties, the increased rates as published from the Ohio districts to that part of affected territory in Northwestern Ohio were suspended by order made and entered in our Investigation and Suspension Docket No. 51; and after the case was tried and submitted, the Commission rejected the suspended schedules to the extent that they provided for increases in excess of 40 per cent of the rates that were in effect immediately prior to August 26, 1920. The rates from the Ohio and Crescent districts were again changed July 1, 1922 as a result of Reduced Rates, 1922, 68 I. C. C. 676, which required a 10 per cent reduction. Here again the carriers attempted to restore the differentials of 40 and 60 cents to all points in affected territory by tariff publications reducing the rates from the Inner Crescent 10 per cent and by establishing rates from the Ohio districts 40 cents less than the rates from the Inner Crescent as reduced, and rates from the Outer Crescent 20 cents over the reduced rates from the Inner Crescent. By this method, the rates from the Ohio districts were reduced less than 10 per cent. This adjustment, insofar as it affected the Ohio intrastate rates, was attacked in a formal complaint filed with us by the Southern Ohio Coal Exchange, et al., on the grounds that it was unjustly discriminatory and that the resultant rates from the Ohio districts to affected territory in Northwestern Ohio were unreasonable, unduly prejudicial to the Ohio districts and preferential of the Crescent districts. The case was docketed under our No. 2601, and, after full hearing and argument, this Commission, on August 22,

1922, made and entered an order requiring the carriers to reduce the said Ohio intrastate rates full ten per cent. The action taken by this Commission in the two cited cases had the effect of increasing the differentials, Ohio under the Inner and Outer Crescents, to affected territory in Ohio, from 40 and 60 cents to 50 and 75 cents, respectively. However, the differentials of 40 and 60 cents to affected territory in Northeastern Indiana and the Southern peninsula of Michigan remained unchanged.

Early in the year 1921, seven formal complaints were filed with the Interstate Commerce Commission involving the rates and rate relationships on coal from the Ohio and Crescent districts to destinations in Ohio, Indiana and Michigan, generally. It would unduly burden this report to attempt to set forth the many allegations contained in said complaints, but one of the complaints filed by the Southern Ohio Coal Exchange alleged that the differentials in the rates to affected territory, Ohio under the Crescents, were too narrow and therefore prejudicial to the Ohio districts and preferential of the Crescents. All of these complaints were consolidated for hearing and disposed of in one report. The consolidated proceeding is entitled "Ohio-Michigan Coal Cases". The case was decided by the Interstate Commission on June 8, 1923, I. C. C. 663. We quote below from the findings in said Case in respect to the differential adjustment:

"We find that the differential of 40 cents per ton between the rates from the southern Ohio and Inner Crescent districts to affected territory is, and for the future will be, unduly prejudicial to the southern Ohio districts and unduly preferential of the Inner Crescent district to the extent that the said differential between the southern Ohio and Inner Crescent districts is less than 50 cents per net ton, and that it is and for the future will be, unduly prejudicial to the Inner Crescent districts and unduly preferential of the southern Ohio districts to the extent that the said differential is more than 50 cents per net ton. We further find that the differential of 60 cents per ton between the rates from the southern Ohio and Outer Crescent districts to affected territory is, and for the future will be, unduly prejudicial to the southern Ohio districts and unduly preferential of the Outer Crescent districts to the extent that the differential between the districts is less than 75 cents per net ton, and

that it is and for the future will be, unduly prejudicial to the Outer Crescent districts and unduly preferential of the southern Ohio districts to the extent that said differential is more than 75 cents per net ton. This record does not indicate that any increase in the rates from the Inner Crescent would be justified, but an increase of 5 cents per ton in the rates from the Outer Crescent to affected territory would result in rates no more than reasonable and would offset to some extent the loss in revenue that would result from increasing the differential between the rates from the southern Ohio and Inner Crescent districts to affected territory by a reduction of 10 cents per ton in the interstate rates from southern Ohio."

[fol. 111] The carriers were ordered to establish rates to affected territory in accordance with the findings above quoted to become effective September 27, 1923. Accordingly, rate schedules were filed by the carriers, reflecting the prescribed differentials, effective September 27, 1923, and such rate schedules have been in effect ever since. It will be observed that the differentials prescribed by the Interstate Commission to the entire affected territory are in the same amounts as those to affected territory in Northwestern Ohio resulting from the two decisions rendered by this Commission in the cases previously mentioned herein.

Our order of January 14, 1921 in I. & S. Docket No. 51, Supra, wherein we denied the carriers' proposals to increase Ohio intrastate coal rates in excess of 40 per cent of the rates that were in effect immediately prior to August 26, 1920, applied, not only to the rates from the Southern Ohio districts to affected territory, but to all coal rates within Ohio, regardless of point of origin or destination. Likewise our order of August 22, 1922 in Docket 2061, supra, wherein we ordered the carriers to reduce their intrastate coal rates in effect on June 30, 1922, by full 10 per cent, applied, not only to points in affected territory, but also from all mines and coal shipping points in Ohio to all destinations in Ohio. Accordingly, tariff schedules were published and filed with the Commission in conformity with the two decisions just previously mentioned.

There is a large consuming territory in Northeastern Ohio, known as non-affected differential territory, but it can be considered differential territory only insofar as in-

terstate rates are concerned. The limits of this territory can not be definitely determined from the record, but as near as can be ascertained, it lies East of the Sandusky-Galion line, and is bounded on the South by an irregular line, extending Southeasterly South of Mt. Vernon, thence Northeasterly to the Ohio-Pennsylvania line near Sharon, Pa.; it includes such points as Mansfield, Wooster, Ashland and Cleveland, but does not include points in the Mahoning Valley or Youngstown district. In the C. F. A. case, Supra, decided July 13, 1917, the Interstate Commerce Commission found, with respect to interstate rates only, that the rates from the Connellsville district to Cleveland and other points in the so-called non-affected differential territory, were, and for the future would be, unduly prejudicial to the Connellsville district and unduly preferential of the Pittsburgh district to the extent that the rates from the Connellsville district exceeded the rates from the Pittsburgh district by more than 6 cents per net ton; and that the rates from the Connellsville district to Youngstown, Ohio, and points taking the Youngstown rates, were, and for the future would be, unduly prejudicial to the Connellsville district and unduly preferential of the Pittsburgh district to the extent that the rates from the Connellsville district exceeded the rates contemporaneously in effect from the Pittsburgh district by more than 8 cents per net ton.

Late in the year 1922, upon petition of the Ohio carriers, the Interstate Commission instituted an investigation, under section 13 of the Interstate Commerce Act, to determine whether the intrastate rates on coal within Ohio, maintained by orders of the Public Utilities Commission of Ohio, caused or would cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in intrastate commerce on the one hand and interstate commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce. This case was given I. C. C. docket No. 12851, but was heard and disposed of in connection with other cases in the Ohio-Michigan Coal Cases, Supra. In disposing of this proceeding the Interstate Commerce Commission, in its report of June 8, 1923, said:

"We find that the application by respondents of rates for the transportation of bituminous coal, in carloads, in intrastate commerce from mines in Ohio to destinations in af-

fected territory in northwestern Ohio and in non-affected differential territory in northeastern Ohio, lower than the rates applied for correspondingly similar services in the transportation of bituminous coal, in carloads, in interstate commerce from those mines to destinations in such territories in Ohio has resulted, and will result, in undue preference of shippers and localities in intrastate commerce within the State of Ohio, undue prejudice to shippers and localities in interstate commerce, and unjust discrimination against interstate commerce. The differentials between southern Ohio and the Crescents prescribed in this report on interstate traffic will go far to remove the undue prejudice and preference, and unjust discrimination against interstate commerce, which we find to exist in the relation of interstate and intrastate rates from Ohio, and it may be that [fol. 112] respondents upon application to the Ohio commission will be authorized to complete the removal and restore the rate parity formerly existing. *No order will be entered at this time in No.* 12851." (The underscoring is ours.)

It is apparent to us, after reading the above findings, that the Interstate Commission was not convinced that the Ohio intrastate rates to points in the so-called non-affected differential territory were lower than the rates applied for correspondingly similar services in interstate commerce—in fact this record shows that many of the former, as well as the present, rate relationships were and are prejudicial to Ohio intrastate commerce and preferential of interstate commerce. If the Interstate Commission really thought that the Ohio intrastate rates to said non-affected differential territory caused discrimination against interstate commerce and that former rate relationships should be restored, it is strange that it failed to put its thoughts into execution by the promulgation of a formal order.

The record shows that after the decisions in the Ohio-Michigan Coal Cases, Supra, had been rendered the carriers sought an informal conference with the Commission for the purpose of discussing the matter of increasing the coal rates from mines in the Ohio districts to points in the so-called non-affected differential territory in northeastern Ohio so as to restore the former differentials or rate relationships that existed prior to the changes which were

brought about by orders in I. & S. Docket No. 51 and Complaint Docket No. 2601, Supra, dated January 14, 1921 and August 22, 1922, respectively. The conference was held in the office of the Commission, Columbus, Ohio, on August 1, 1923, at which time the carriers asked informally to make increases in the rates as hereinbefore mentioned. At said conference the Commission verbally and informally advised the carriers that it would not then pass upon what was the proper rate parity, but that they might file tariff containing rates such as would restore the parity with interstate rates and the differential relationships from the Pittsburgh and Connellsville districts which existed for many years prior to August 26, 1920. Schedules were filed accordingly by the carriers, effective September 27, 1923 and had the result of increasing the rate from the Cambridge district to Mansfield by 8 cents per ton. However, the Commission, at the time, notified the carriers that all such rates would be subject to attack, as to their reasonableness and lawfulness, by any interested party. One of the rates—the rate from the Cambridge district to Mansfield—is now under attack in this proceeding. The informal conference, referred to, was held approximately 9 years ago and the membership of the commission has changed entirely since then. We do not sanction the informal action taken by the former Commission and it is difficult for us to understand how such informal action could be held as binding, or have any lawful effect, especially in view of the fact that the Commission's orders in I. & S. Docket No. 51 and Complaint Docket No. 2601, Supra, were outstanding at the time and had not been cancelled or modified. The interveners contend that a moral obligation rests upon us to stand by the understanding had with the Carriers at the informal conference. If, under the circumstances, any moral obligation rests upon us we are not conscious of it. If the rate herein assailed is unreasonable or unduly prejudicial it is unlawful regardless of any differentials or rate relationships that may have existed in the past. According to the interveners' theory the carriers could at will increase the rates from points in the Pittsburgh and Connellsville districts to Mansfield and other points in the so-called non-affected differential territory in Ohio, and at the same time increase the rates from Cambridge and No. 8 districts to the same destinations, in the same amounts, that the interstate rates are increased,

even though this might result in the establishment of rates unreasonably high from the said Ohio districts.

It is well known that in the transportation of coal from the Pittsburgh and Connellsville districts, bridges across the Ohio River, costly to construct, and expensive to maintain, must be crossed, and that no such condition obtains in connection with the transportation of coal from the Ohio districts to destinations in Ohio.

It is well known that carriers' revenues are, at present and have been for the past 2 years, at low ebb, due to the general business depression and industrial inactivities. Nevertheless, the carriers' financial needs cannot be relied upon as justification for the imposition of unjust and unreasonable rates on coal. All will concede that the carriers should have adequate revenues, but it cannot be held [fol. 113] that they are entitled to derive them, in whole or in part, from unjust and unreasonable rates on a single commodity. It is equally well known, by all who are informed, that the Ohio coal industry is, and has been for several years past, in a deplorable condition, probably in a more precarious condition than the transportation industry. There is nothing in this record to convince us that the rate sought by complainant would not bear its full share of the transportation costs.

In Republic Steel Corporation vs. B. & O. R. R. Co. et al., Supra, decided June 30, 1932 we said:

"Coal is a low grade commodity; it loads to the capacity of the car; it moves regularly throughout the year and in trainload lots; it moves in open top cars and requires no expedited or special service; it cannot be damaged by weather conditions or by rough handling and claims for loss or damage are practically nil. In view of the foregoing, it would appear that coal is very desirable traffic, with which are connected substantially all the elements that go to make low freight rates proper."

We find that the present rate of 176 cents from all mines on the Baltimore and Ohio R. R. in the Cambridge district of Ohio to Mansfield, Ohio, is unreasonable and unduly prejudicial to the extent it exceeds 151 cents. An appropriate order will be entered.

[fol. 114] EXHIBIT E TO PETITION

Copy.

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

Special Permission No. 6492

Re Application of the Wheeling and Lake Erie Railway Company and the Lorain and West Virginia Railway Company for Special Permission to Publish, to Become Effective August 1, 1932, on Not Less Than One Day's Notice, Rates on Bituminous Coal, Carloads, from All Mines and Coal Shipping Points on the Wheeling and Lake Erie Railway in the Ohio No. 8, Middle, and Massillon Districts to Cleveland, Lorain, Huron, Akron and Other Points in Northern Ohio, on Reduced Basis as Shown in Exhibit "A", Which Accompanied the Application

It appearing, that the Wheeling and Lake Erie Railway Company and the Lorain and West Virginia Railway Company, by petition filed this date, request special permission to publish, to become effective August 1, 1932, on not less than one day's notice, rates on bituminous coal, carloads, from mines and coal shipping points on the Wheeling and Lake Erie Railway in the Ohio No. 8, Middle-Coshocton and Massillon districts of Ohio to Cleveland, Lorain, Huron, Akron and other points in Northern Ohio, such rates to represent reductions in the rates now in effect as set forth in Exhibit "A", which accompanied the application; and

It further appearing, that the proposed reduced rates will be substantially on the same basis as those prescribed by the Commission in Docket No. 7252 on bituminous coal in carload lots from mines and coal shipping points in the Ohio No. 8 and Middle-Coshocton districts to Canton and Massillon, Ohio, it is

Ordered, that the Wheeling and Lake Erie Railway Company and the Lorain and West Virginia Railway Company be, and hereby they are, granted special permission to establish, on not less than one day's notice, to become effective August 1, 1932, rates on bituminous coal, carloads, from mines and coal shipping points on the Wheeling and Lake Erie Railway in the Ohio No. 8, Middle-Coshocton and Mas-

sillon districts of Ohio to Cleveland, Lorain, Huron, Akron and other points in Northern Ohio as set forth in Exhibit "A", which accompanied the application and which said Exhibit "A" is hereby referred to and made a part hereof; and it is further

Ordered, that in establishing the reduced rates herein authorized on less than statutory notice, the petitioners be, and hereby they are, granted special permission to waive that part of Rule 5 of our Tariff Circular No. 2 with respect to maintaining the rates herein authorized as maxima for a period of one year and such petitioners are also hereby granted special permission to publish the reduced rates herein authorized to expire with August 1, 1933, unless sooner cancelled, changed or extended.

Dated at Columbus, Ohio, this 20th day of July, 1932.

The Public Utilities Commission of Ohio, E. J. Hopple, Chairman; Frank W. Geiger, John W. Bricker, Commissioners.

A true copy:

(Signed) Ira E. Sprankle, Superintendent of Investigation. (Seal.)

[fol. 115] BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

Supplement No. 1 to Special Permission No. 6492

Good cause appearing therefor:

It is ordered, that the third paragraph of Special Permission No. 6492, issued by The Public Utilities Commission of Ohio on July 20, 1932, be, and hereby it is, amended to read, as follows:

"Ordered, that the Wheeling and Lake Erie Railway Company and the Lorain and West Virginia Railway Company be, and hereby they are granted special permission to establish, on not less than one day's notice, to become effective August 1, 1932, rates on bituminous coal, carloads, from mines and coal shipping points on the Wheeling and Lake Erie Railway in the No. 8, Middle, and Massillon (including Sherrodsville Sub-District and Coshocton Sub-District) as shown on pages 34 and 35 of F. V. Davis' Agent, tariff, Ohio No. 48, or as the same may be supplemented, to Cleveland, Lorain, Huron, Akron, and other points in Northern Ohio, in the amounts and as set forth in Exhibit

"A", which accompanied the application and which said Exhibit "A" is hereby referred to and made a part hereof.

Dated at Columbus, Ohio, this twenty-first day of July, 1932.

The Public Utilities Commission of Ohio, E. J. Hopple, Chairman; Frank W. Geiger, John W. Bricker, Commissioners.

A true copy:

Ira E. Sprankle, Superintendent of Investigation.

[fol. 116]

EXHIBIT A

Rates Shown Below are to be Subject to Tariff of Emergency Charges

The Wheeling and Lake Erie Railway

From / To	No. 8 district proposed	Middle district proposed	Massillon district proposed
	Rates in Cents Per Net Ton		
Cleveland, Ohio	145	122	108
Newburg (93rd St.), Ohio	145	122	108
Brooklyn, Ohio	145	122	108
Miles Avenue, Ohio	145	122	108
Bedford, Ohio	145	122	108
Falls Junction, Ohio	145	122	108
Solon, Ohio	145	122	108
Chagrin Falls, Ohio	145	122	108
Twinsburg, Ohio	145	122	108
Moran, Ohio	145	122	108
Kent, Ohio	128	101	87
Brimfield, Ohio	128	101	87
Mogadore, Ohio	122	94	80
Suffield, Ohio	122	94	80
Mishler, Ohio	122	94	80
Congress Lake, Ohio	122	94	80
Hartville, Ohio	122	94	80
Middle Branch, Ohio	122	94	80
East Greenville, Ohio	108	80	72
Dalton, Ohio	122	94	72
Burton City	122	94	72
Somenberg, Ohio	122	94	72
Snively, Ohio	122	94	72
Orville, Ohio	122	94	72
Pryor	122	94	72
Smithville	122	94	72
Creston, Ohio	122	94	72
Burbank Spur, Ohio	145	108	101
Lodi	145	108	101
Pawnee, Ohio	145	108	101
Spencer, Ohio	145	108	101
Wellington, Ohio	145	108	101
Brighton, Ohio	155	134	101
Clarksfield, Ohio	155	134	101
Hartland, Ohio	155	134	115
Milan, Ohio	156	134	115
Huron, Ohio	155	134	115
Lorain, Ohio	145	128	108
South Lorain, Ohio	145	128	108

Akron, Canton & Youngstown Railway Company

Colona, Ohio	128	101	87
Forest Hill, Ohio	128	101	87
Brittain, Ohio	128	101	87
East Akron, Ohio	128	101	87
Akron, Ohio	128	101	87
Fairlawn, Ohio	128	101	87
Barberton, Ohio	128	101	87

NOTE.—For list of mines and stations located in the above described origin districts see Agent F. V. Davis' Ohio No. 48.

[fol. 117] EXHIBIT F TO PETITION

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 8072

In the Matter of the Investigation by the Commission, Upon Its Own Motion, of the Rates and Charges Now in Effect for the Transportation of Bituminous Coal, Carload Lots, from Mines and Coal Shipping Points in the Cambridge, Crooksville and Hocking Districts of Ohio to Cleveland, Lorain, Huron, Akron, Orrville, Rocky River, Ohio, and Points Intermediate Thereto

This day, after full hearing, due notice of the time and place of which was given to all parties in interest pursuant to law, this matter came on for final determination in pursuance to the citation heretofore issued to respondents, The Baltimore and Ohio Railroad Company, The Pennsylvania Railroad Company, The New York Central Railroad Company and The Wheeling and Lake Erie Railway Company (The Pittsburgh and West Virginia Railroad Company also made a respondent but hereby dismissed) to show cause, if any there were, why their rates for the transportation of bituminous coal, carload lots, from the Cambridge, Crooksville and Hocking Districts shall not be established upon the same or substantially the same rate basis as the rates which the said respondents are now maintaining, imposing, charging and collecting for the transportation of coal from points of origin in the Middle and No. 8 Districts to Cleveland, Lorain, Huron, Akron, Orrville, Rocky River and points intermediate thereto.

The Commission, being fully advised in the premises and the respondents and interveners having waived the filing of briefs, finds upon the law and the testimony and exhibits offered and introduced in evidence at such hearing:

That for many years past and to August 1st, 1932, and September 2nd, 1932, when the said respondents established certain reduced rates from points of origin in the Middle and No. 8 coal districts in the State of Ohio to the aforesaid points of destinations, the respondents maintained for the transportation of coal in carload lots from points of origin in the Cambridge District the same rates, with only minor variations, as applied from points of origin in the No. 8 District, which adjustment of rates the Commission finds to have been and to be, for the future, just, reasonable and non-discriminatory;

That during such time and until August 1st, 1932, and September 2nd, 1932, when the respondents made said reductions in rates on coal from the Middle and No. 8 Districts to said points of destination, the respondents maintained for the transportation of bituminous coal in carload lots from points of origin in the Hocking and Crooksville Districts of Ohio rates which exceeded the rates published and maintained by the same carriers from points in the said No. 8 District to the said destinations, by certain specific differences in cents per ton; which adjustments of rates the Commission finds to have been and to be just, reasonable and non-discriminatory;

That the said respondents and each of them, on August 1st and September 2nd, 1932, failed, neglected and refused, and have since failed, neglected and refused to make the same reductions or substantially the same reductions in their rates from the points of origin in the Cambridge, Hocking and Crooksville Districts to said destinations as from the points of origin in the Middle and No. 8 Districts;

That the producers and shippers of bituminous coal in the Cambrdge, Hocking and Crooksville Districts of Ohio are, and for many years, have been in active competition with the producers and shippers of bituminous coal in the No. 8 and Middle Districts of Ohio, in the markets of the destinations hereinbefore named, and that the respondents by individual line and/or joint through rates serve shippers of bituminous coal from all of said Districts to said destinations;

[fol. 118] That by reason of such failure, neglect and refusal by said respondents to make similar or substantially similar reductions in the rates for the transportation of coal from said points of origin in said Cambridge, Hocking

and Crooksville Districts to said points of destination as were made from points of origin in said Middle and No. 8 Districts, the existing rates unduly prefer the shippers of coal in said Middle and No. 8 Districts and unjustly, unduly and unlawfully discriminate against the shippers and producers of coal in said Cambridge, Crooksville and Hocking Districts and against the localities situated therein; and

That the said respondents aforesaid and each of them have failed to show any cause why their rates for the transportation of coal from points of origin in the said Cambridge, Hocking and Crooksville Districts to the aforesaid points of destination should not be adjusted so as to remove such unjust, undue and unlawful discrimination against the shippers in said districts and against the localities situated therein.

It is, therefore, ordered, That said The Baltimore and Ohio Railroad Company, said The Pennsylvania Railroad Company, said The New York Central Railroad Company and said The Wheeling and Lake Erie Railway Company, the respondents herein, be, and hereby they and each of them are notified, directed and required, according as they participate in said traffic, to cease and desist on or before September 20th, 1932, and thereafter to abstain from publishing, demanding or collecting for the transportation of bituminous coal in carloads, rates from the Cambridge District to the destinations hereinbefore named which exceed the rates currently maintained from the No. 8 District to the same destinations; except, that in instances in which there were differences in rates from and to specific points prior to August 1st, and September 2nd, 1932, the same differences may be maintained; and to cease and desist and abstain from demanding or collecting for the transportation of bituminous coal from the Hocking and Crooksville Districts to said destinations hereinbefore named rates which exceed the rates currently maintained from the No. 8 District to said destinations by a greater number of cents per ton than the rates from the Hocking and Crooksville Districts prior to said reductions on August 1st and September 2nd, 1932, exceeded the rates from No. 8 District, to said destinations; and the said carriers are hereby directed and required, according as they participate in said traffic, to establish over available routes

through non-affected territory on or before September 20, 1932, at 12:01 o'clock A. M., upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed by law, and thereafter to maintain and apply to the transportation of bituminous coal from the Cambridge, Hocking and Crooksville Districts to said destinations, such rates as will remove the undue discrimination found to exist.

Dated at Columbus, Ohio, this 15th day of September, 1932.

The Public Utilities Commission of Ohio, E. J. Hopple, Chairman; John W. Bricker, Frank W. Geiger, Commissioners.

A true copy:

Ira E. Sprankle, Superintendent of Investigation.

(Seal.)

[fol. 119] EXHIBIT G TO PETITION

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 8097

In the Matter of the Investigation by the Commission, Upon its Own Motion, of the Rates and Charges Now in Effect for the Transportation of Bituminous Coal, Carload Lots, from Mines and Coal Shipping Points in the Pomeroy District of Ohio to Cleveland, Lorain, Huron, Akron, Orrville, Rocky River, Ohio, and Points Intermediate Thereto

Submitted October 14, 1932. Decided October 18, 1932

Findings and Order of the Commission

This day, after full hearing, due notice of the time and place of which was given to all parties in interest pursuant to law, this matter came on for final determination in pursuance to the citation heretofore issued to respondents (The New York Central Railroad Company and other carriers joining it in the establishment of joint through rates on bituminous coal in carload lots from mines and shipping points on the New York Central Railroad in the Pomeroy district of Ohio) to show cause, if any there were, why their rates

for the transportation of bituminous coal, carloads, from the said Pomeroy district shall not be established upon the same or substantially the same rate basis as the rates which the said respondents are now maintaining, imposing, charging and collecting for the transportation of coal, carloads, from points of origin in the Middle and No. 8 districts to Cleveland, Lorain, Huron, Akron, Orrville, Rocky River, Ohio, and points intermediate thereto.

The Commission, being fully advised in the premises and the respondents having waived the filing of briefs, finds upon the law, the testimony and exhibits offered and introduced in evidence at such hearing:

That, for many years past and to August 1, 1932, and September 2, 1932, when the said respondents established certain reduced rates from points of origin in the Middle and No. 8 coal producing districts of Ohio to the aforesaid points of destination, the respondents maintained, for the transportation of bituminous coal, in carload lots, from points of origin in the Pomeroy district, rates which exceeded the rates published and maintained by the same carriers from points in the said No. 8 district to the aforesaid destinations, by certain specific differences in cents per net ton, which adjustments of rates the Commission finds to have been and to be just, reasonable and non discriminatory;

That the said respondents and each of them, on August 1st and September 2nd, 1932, failed, neglected and/or refused, and have since failed, neglected and/or refused to make the same or substantially the same reductions in their rates for the transportation of bituminous coal, in carload lots, from the mines and shipping points in the Pomeroy [fol. 120] district to said destinations as from the mines and shipping points in the Middle and No. 8 districts to the same destinations;

That the producers and shippers of bituminous coal in the Pomeroy district of Ohio are, and for many years have been, in active competition with the producers and shippers of bituminous coal in the Middle and No. 8 districts of Ohio, in the markets of the destinations hereinbefore named, and that the respondents, by individual line and/or joint through rates, serve shippers of bituminous coal from all of said districts to said destinations;

That by reason of such failure, neglect and/or refusal by said respondents to make similar or substantially similar reductions in the rates for the transportation of bituminous coal, in carload lots, from mines and shipping points in the Pomeroy district to said points of destination as were made from mines and shipping points in said Middle and No. 8 districts, the existing rates unduly prefer the shippers of coal in said Middle and No. 8 districts and unjustly, unduly and unlawfully discriminate against the shippers and producers of coal in said Pomeroy district and against the localities situated therein; and

That the said respondents and each of them have failed to show any convincing cause why their rates for the transportation of bituminous coal, carloads, from mines and shipping points in the said Pomeroy district to the aforesaid points of destination should not be adjusted so as to remove such unjust, undue and unlawful discrimination against the shippers of coal in said district and against the localities situated therein,

It is, therefore, ordered, That the respondents herein be, and hereby they, and each of them, are notified, directed and required, according as they participate in said traffic to cease and desist on or before October 28, 1932, and thereafter to abstain from publishing, demanding or collecting for the transportation of bituminous coal, carloads, rates from the mines and shipping points on the New York Central Railroad in the Pomeroy district of Ohio to the said destinations hereinbefore named, which exceed the rates contemporaneously maintained from the No. 8 district to said destinations by a greater number of cents per net ton than the rates from the Pomeroy district prior to said reductions on August 1 and September 2, 1932, exceeded the rates from No. 8 district to said destinations; and the said respondents are hereby directed and required, according as they participate in said traffic, to establish, over available routes through non-affected territory, on or before October 28, 1932, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed by law, and thereafter to maintain and apply to the transportatoin of bitumnious coal, carloads, from mines and shipping points on the New York Central Railroad in

said Pomeroy district to the aforesaid destinations, such rates as will remove the undue discrimination herein found to exist.

The Public Utilities Commission of Ohio, E. J. Hopple, Chairman; Frank W. Geiger, John W. Bricker, Commissioners.

A true copy:

Ira E. Sprankle, Superintendent of Investigation. (Seal.)

[File endorsement omitted]

[fol. 121] IN UNITED STATES DISTRICT COURT

No. 1039

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed June 3, 1933

United States of America, one of the defendants in the above-entitled proceeding, for answer to the petition filed therein against it answers and says:

I

United States admits the truth of the allegations made and contained in the opening paragraph and paragraphs (1), (2) and (3) of the petition.

II

United States admits the allegation in paragraph (4) of the petition that the State of Ohio is empowered to and does regulate rates for the transportation of property by railroad between points within its borders, but alleges that such power is subordinate to the federal power of the Interstate Commerce Commission expressly granted it by the Interstate Commerce Act to regulate intrastate rates to the extent therein authorized.

[fol. 122]

III

The United States admits the allegations contained in paragraphs (5) to (12), both inclusive, of the petition, but denies that the validity of the orders of the Interstate Commerce Commission is affected by any of the allegations made in said paragraphs.

IV

United States admits the allegations contained in paragraphs (13) and (14) of the petition, but for a full, accurate and complete statement of the matters, things and conclusions contained and stated in said reports of the Interstate Commerce Commission, the United States respectfully refers the Court to the full text of said Commission's reports and decisions contained in said Exhibit "A" and Exhibit "B" to the petition.

V

United States denies each and every allegation contained in paragraphs (15), (16) and (17) of the petition, except that it admits that, by virtue of the superior federal power expressly reposed by statute in the Interstate Commerce Commission its said orders must prevail over the orders of the Public Utilities Commission of Ohio.

VI

United States denies the allegations made and contained in paragraph (18) of the petition, and in the separate subdivisions thereof, and denies that said orders of the Interstate Commerce Commission are unlawful or invalid for any of the reasons therein set forth, or for any other reason; and United States particularly denies the allegation that [fol. 123] said orders are unsupported by proper findings, and the further allegation that said orders are not supported by substantial evidence.

VII

United States alleges that the statements made and contained in paragraphs (19) and (20) of the petition are purely argumentative, and are irrelevant, incompetent and immaterial to the validity of said orders of the Interstate Commerce Commission; but, if the allegations of said para-

graph should become relevant and material, United States denies that they are true.

VIII

Answering paragraph (21) of the petition, United States denies that said orders of the Interstate Commerce Commission will result in irreparable injury or other legal damage to the State of Ohio or its people, or to any one else, and further denies that said orders will deprive any of the people of the State of Ohio of their property without due process of law.

IX

United States denies the allegations made and contained in paragraph (22) of the petition, and says that said allegations are argumentative, and are irrelevant, incompetent and immaterial to the question whether the said orders of the Interstate Commerce Commission are valid.

X

Answering paragraph (23) of the petition, United States says that it is without knowledge as to whether plaintiffs [fol. 124] have an adequate remedy at law in the premises, except that it admits that a suit to enjoin, annul or set aside the orders of the Interstate Commerce Commission may be brought only by invoking the statute mentioned in paragraph (1) of the petition.

XI

Except as herein expressly admitted, United States denies each and every allegation made and contained in the petition, and each of the several paragraphs thereof.

Wherefore, having fully answered the petition, United States prays that the relief therein prayed be denied and the petition dismissed with costs to the petitioners, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General. Haveth E. Mau, United States Attorney.

[fol. 125] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

[fol. 126] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed June 3, 1933

The Interstate Commerce Commission, hereinafter called the Commission, defendant in the above-entitled suit, now and at all times hereinafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraph 1 of the petition, the Commission admits and alleges that in a consolidated proceeding then pending before it, entitled Intrastate Rates on Bituminous Coal within the State of Ohio, it made and issued the report and order dated May 2, 1933, a copy of which is at- [fol. 127] tached to the petition marked "Exhibit A"; that said proceeding embraced No. 25566; an investigation instituted by the Commission upon its own motion, following the filing of petitions by twelve railroad common carriers engaged in interstate commerce (and, except in four instances, also engaged in intrastate commerce within the State of Ohio) and therefore subject to the provisions of the Interstate Commerce Act and to the jurisdiction of the Commission, to determine whether the existing rates on bituminous coal, in carloads, from Ohio Nos. 8, Middle, Massillon, Cambridge, Crooksville, Hocking, and Pomeroy districts in Ohio in intrastate commerce to destinations in northeastern Ohio, including Canton, Massillon, Mansfield, Cleveland, Lorain, Huron, Akron, Orrville, Rocky River, and intermediate points, required, authorized or permitted to be maintained by the Public Utilities Commission of Ohio, caused or would cause any undue or unreasonable advantage, preference, or prejudice as between persons or

localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and also to determine what rates and charges, if any, or what maximum or minimum or maximum and minimum should be prescribed to be charged by said railroads between said origins and destinations for such transportation in order to remove such advantage, preference, prejudice, or discrimination, if any, as might be found to exist; that all railroads subject to the Commission's jurisdiction operating within the State of Ohio were made respondents to said proceeding; that after the institution of said investigation four formal complaints relating to the same subject matter were filed with the Com- [fol. 128] mission, namely: No. 25590, Western Pennsylvania Coal Traffic Bureau et al. v. Akron, Canton & Youngstown Railway Company et al.; No. 25656, H. W. Showalter, Receiver, Continental Coal Company et al. v. Akron, Canton & Youngstown Railway Company et al.; No. 25657, Property Owners' Committee et al. v. Akron, Canton & Youngstown Railway Company et al.; and No. 25670, Robert C. Hill, Frank R. Lyon and Howell Fisher, Domiciliary Receivers of the Consolidation Coal Company et al. v. Akron, Canton & Youngstown Railway Company et al.; that said formal complaints alleged, among other things, that the relation between the aforesaid Ohio intrastate rates on bituminous coal, on the one hand, and the interstate rates on bituminous coal from various mining districts in Pennsylvania, West Virginia, Virginia, and Kentucky to the same Ohio destinations, on the other hand, resulted in undue preference of persons and localities in Ohio and undue prejudice against complainants, in violation of sections 3 and 13 of the Interstate Commerce Act; that said formal complaint cases were consolidated for hearing with No. 25566 and were heard jointly with that case, and there were also heard and considered with the above-mentioned cases two investigation and suspension cases, namely, Investigation and Suspension Dockets Nos. 3801 and 3833, both entitled Coal from Pennsylvania to Northern Ohio, and all of said cases were decided and disposed of together in and by said report and order of May 2, 1933 (except that one matter in issue in Nos. 25656 and 25670 was reserved for further consideration by the Commission, and for this

reason these two cases were left open on the Commission's docket for future disposition of that issue).

[fol. 129] The Commission respectfully refers the Court to the text of said report and order (Exhibit A to petition) for full, complete, and accurate information concerning the contents thereof.

Further answering paragraph 1 of the petition, the Commission admits and alleges that in a proceeding then pending before it, entitled No. 25885, Surcharge on Bituminous Coal within the State of Ohio, it made and issued the report and order dated May 9, 1933, a copy of which is attached to the petition marked "Exhibit B"; that said proceeding was an investigation instituted by the Commission upon its own motion, following the filing of a petition by The Public Service Commission of the Commonwealth of Pennsylvania, to determine whether, through refusal of the Public Utilities Commission of Ohio to permit increases in freight rates on bituminous coal on and after April 1, 1933, for intrastate traffic within the State of Ohio corresponding to those which were approved for interstate traffic in Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 179 I. C. C. 215, 191 I. C. C. 361, such intrastate rates caused or would cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce, on the other hand, or any unjust discrimination against interstate or foreign commerce, and also to determine what rates and charges, if any, or what maximum or minimum or maximum and minimum should be prescribed to be charged by the carriers, in order to remove such advantage, preference, prejudice or discrimination, if any, as might be found to exist; that all railroads subject to the Commission's jurisdiction [fol. 130] operating within the State of Ohio were made respondents to said proceeding; that, after a full hearing in said investigation, the Commission issued its report and order as aforesaid.

The Commission respectfully refers the Court to the text of said report and order (Exhibit B to petition) for full, complete, and accurate information concerning the contents thereof. The Commission also respectfully refers the Court to the reports in Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 179 I. C. C. 215, 191 I. C. C. 361, and Increases in Intrastate Freight Rates, 186 I. C. C. 615, copies of

which reports are attached hereto, marked Exhibits 1, 2, 3 and 4, respectively, and made a part hereof.

II

Answering paragraphs 2 and 3 of the petition, the Commission admits for the purposes of this suit that the allegations contained in said paragraphs are true.

III

Answering paragraph 4 of the petition, the Commission denies that plaintiffs possess power to regulate the rates of interstate carriers for transportation of property between points in the State in such manner as to cause undue preference of Ohio shippers and localities, undue prejudice against interstate localities and shippers, or unjust discrimination against interstate commerce.

IV

Answering paragraphs 5 to 12, both inclusive, of the petition, the Commission admits for the purposes of this suit that the Public Utilities Commission of Ohio took the action therein described.

V

Answering paragraph 4 of the petition, the Commission admits and alleges that by order of October 3, 1932, first supplemental order of October 28, 1932, and second supple- [fol. 131] mental order of December 7, 1932, it instituted, upon its own motion, the proceeding entitled No. 25566, Intrastate Rates on Bituminous Coal within the State of Ohio; that in said proceeding, consolidated as aforesaid with the four formal complaint cases, a full hearing was had; that at said hearing, and in all proceedings in connection therewith, the Public Utilities Commission of Ohio and various Ohio shipping interests were represented by their attorneys who took an active part in the development of the record therein; that at said hearing the Commission accorded to all parties to said consolidated proceeding, including the Public Utilities Commission of Ohio and said shipping interests, full and fair opportunity to be heard upon all matters involved in said proceeding; that at said hearing a large volume of testimony and other evidence

bearing upon said matters was submitted to the Commission for consideration on behalf of said parties, including the Public Utilities Commission of Ohio, plaintiff herein, by their respective counsel; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and entered and served upon the parties to said proceeding its said report and order of May 2, 1933, which said report and order included the Commission's findings of fact, decisions, conclusions, orders, and requirements in the premises; and that, upon the evidence aforesaid and as shown in and by said report, the Commission made the findings and stated the conclusions upon which said order is based.

[fol. 132] The Commission further alleges that the findings and conclusions in said report of May 2, 1933, were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the Commission in said proceeding as aforesaid, and the Commission denies each of and all the allegations to the contrary contained in the petition.

Further answering paragraph 13 of the petition, the Commission denies that said paragraph sets forth fully and correctly the requirements, terms, conditions, and authorizations contained in said order of May 2, 1933, and the Commission respectfully refers the Court to the order itself for full, complete, and accurate information as to the contents thereof.

VI

Answering paragraph 14 of the petition, the Commission admits and alleges that by order of March 29, 1933, it instituted, upon its own motion, the proceeding entitled No. 25885, Surcharge on Bituminous Coal within the State of Ohio; that in said proceeding a full hearing was had; that at said hearing, and in all proceedings in connection therewith, the Public Utilities Commission of Ohio and various Ohio shipping interests were represented by their attorneys who took an active part in the development of the record therein; that at said hearing the Commission ac-

corded to all parties to said proceeding, including the Public Utilities Commission of Ohio and said shipping interests, full and fair opportunity to be heard upon all matters involved in said proceeding; that at said hearing a large volume of testimony and other evidence bearing upon said matters, including the evidence in No. 25566, was submitted to the Commission for consideration on behalf of said [fol. 133] parties, including the Public Utilities Commission of Ohio, plaintiff herein, by their respective counsel; that at said hearing questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and entered and served upon the parties to said proceeding its report and order of May 9, 1933, which said report and order included the Commission's findings of fact, decisions, conclusions, orders and requirements in the premises; and that, upon the evidence aforesaid and as shown in and by said report, the Commission made the findings and stated the conclusions upon which said order is based.

The Commission further alleges that the findings and conclusions in said report of May 9, 1933, were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the Commission in said proceeding as aforesaid, and the Commission denies each of and all the allegations to the contrary contained in the petition.

Further answering paragraph 14 of the petition, the Commission denies that said paragraph sets forth fully and correctly the requirements, terms, conditions, and authorizations contained in said order of May 9, 1933, and the Commission respectfully refers the Court to the order itself for full, complete, and accurate information as to the contents thereof.

VII

Answering paragraphs 15 and 16 of the petition, the Commission admits and alleges that certain of the present Ohio intrastate rates on bituminous coal required to be maintained by certain orders of the Public Utilities Commission of Ohio were found by the Commission in said reports and orders of May 2, 1933, and May 9, 1933, to cause undue preference of Ohio shippers and localities, undue

prejudice against interstate localities and shippers, and [fol. 134] undue, unreasonable, and unjust discrimination against interstate commerce, and, therefore, under the provisions of section 13 (4) of the Interstate Commerce Act, the rates prescribed by the Commission in said orders to remove said preference, prejudice, and discrimination are required to be maintained, the law of any State or the decision or order of any State authority to the contrary notwithstanding. Further answering said paragraphs, the Commission denies that said orders of May 2, 1933, and May 9, 1933, will either obstruct or impede the power of the Public Utilities Commission of Ohio either to suspend or investigate or to permit or authorize proposed increased intrastate rates. Further answering said paragraphs, the Commission admits and alleges that said orders of May 2, 1933, and May 9, 1933, will require certain shipments of bituminous coal within the State of Ohio to pay freight charges at rates higher than those now in effect but denies that the present rates are lawful rates for the following reasons: (1) That in making its orders of May 2, 1933, and May 9, 1933, the Commission acted under the authority conferred upon it by paragraphs (3) and (4) of section 13 of the Interstate Commerce Act; (2) that in requiring by said orders increases in the Ohio intrastate rates of the various railroads respondents in the Commission proceeding, all of which are common carriers engaged in interstate commerce (as well as in intrastate commerce) and therefore subject to the provisions of the Interstate Commerce Act and to the jurisdiction of the Commission, for the purpose of removing undue preference of Ohio shippers and localities, undue prejudice against interstate shippers and localities, and undue, unreasonable, and unjust discrimination against interstate commerce, found by the Commission after full [fol. 135] hearing to exist, the Commission did not require increases in a lawful scale of rates, but, on the contrary, required increases in a scale of intrastate rates found by the Commission to be unlawful, in that said scale of rates caused undue preference and undue prejudice as between persons and localities in intrastate commerce on the one hand, and interstate commerce, on the other hand, and undue, unreasonable, and unjust discrimination against interstate commerce, which is forbidden and declared to be unlawful by section 13 (4) of the Interstate Commerce Act.

VIII

Answering paragraph 17 of the petition, the Commission denies the truth of each of and all the allegations contained therein.

IX

Answering paragraph 18 of the petition, the Commission denies that said orders of May 2, 1933, and May 9, 1933, are based upon erroneous constructions of the statutes governing the action and power of the Commission, denies that said orders are based upon erroneous conclusions of law made by the Commission, denies that said orders are not supported by the findings of fact made by the Commission, denies that said findings are not supported by substantial evidence, denies that they are contrary to the evidence in the particulars alleged or in any other respect, and denies that said orders are either unlawful or invalid for the reasons or for any of the reasons set forth in said paragraphs.

X

Answering paragraphs 19 and 20 of the petition, the Commission denies the truth of each of and all the allega-
[fol. 136] tions contained therein.

XI

Answering paragraph 21 of the petition, the Commission denies that the increased charges which it prescribed in its said orders of May 2, 1933, and May 9, 1933, will subject the plaintiffs or any one else either to irreparable injury or irreparable damage or to any legal injury, and denies that either the State of Ohio or its people will be deprived of their property without due process of law.

XII

Answering paragraph 22 of the petition, the Commission denies the truth of each of and all the allegations contained therein.

XIII

Further answering paragraphs 13 to 22 of the petition, the Commission alleges that in making its said reports and orders of May 2, 1933, and May 9, 1933, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called

to its attention on behalf of the parties to said proceeding by their respective counsel, including all matters covered by the material allegations of the petition herein.

The Commission further alleges that said orders of May 2, 1933, and May 9, 1933, were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said orders the Commission did not exceed the authority which had been duly conferred upon it, or exercise that [fol. 137] authority in an unreasonable manner; and the Commission denies each of and all the allegations to the contrary contained in the petition.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition in so far as they conflict either with the allegations herein or with either the statements or conclusions of fact included in said reports and orders of May 2, 1933, and May 9, 1933, which said reports and orders are hereby referred to and made a part of this answer.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that the petition herein be dismissed.

Interstate Commerce Commission, by J. Stanley Payne, Assistant Chief Counsel. Daniel W. Knowlton, Chief Counsel, of Counsel.

Duly sworn to by Frank McManamy. Jurat omitted in printing.

[fol. 138] Exhibit No. 1 to Answer of I. C. C.

— 17221

Interstate Commerce Commission

Fifteen Per Cent Case, 1931

Ex Parte No. 103

In the Matter of Increases in Freight Rates and Charges

Submitted September 30, 1931. Decided October 16, 1931

Application of the rail carriers in the United States for waiver of rules governing publication of schedules so as to permit filing upon short notice of blanket supplements effecting a general increase in freight charges of 15 per cent., denied. Suggestions made, in consideration of ex-

isting circumstances and in the interest of the preservation of an adequate system of transportation, for specific increases in rates upon designated commodities during a limited period, conditioned upon the submission and approval of arrangements between the carriers for the pooling of the revenue accruing from the suggested increases so as primarily to enable them to meet their fixed interest payments as they mature.

Clyde Brown, Henry Wolf Birklé, J. J. Cornwell, H. Fitzpatrick, W. W. Meyer, M. Carter Hall, Chas. R. Webber, and Earle C. Calhoun for carriers in eastern group; Henry J. Hart for Bangor & Aroostook Railroad Company; W. H. T. Loyall, John C. Donnally, and Fred N. Oliver for Virginian Railway Company; H. T. Newcomb for Delaware & Hudson Railroad, Greenwich & Johnsonville Railway, Schoharie Valley Railway, and Cooperstown & Charlotte Valley Railway; G. F. Snyder for Canadian Pacific Railway Company (lines in Maine and Vermont), Spokane International Railway Company, and Aroostook Valley Railroad Company; Charles H. Blatchford for Maine Central Railroad Company and Portland Terminal Company; W. A. Cole for Boston & Maine Railroad; Eugene S. Williams for Western Maryland Railway Company; William L. Kinter for Reading Company; Daniel Willard, jr., and E. L. Beach for Baltimore & Ohio Railroad Company; W. S. Jenney for Delaware, Lackawanna & Western Railroad Company; H. A. Taylor and M. B. Pierce for Erie Railroad Company, Chicago & Erie Railroad Company, New York, Susquehanna & Western Railroad Company; Wilkes-Barre & Eastern Railroad Company, New Jersey & New York Railroad Company, and Bath & Hammondsport Railroad Company; S. R. Merriam for Pere Marquette Railway; W. N. McGehee, Frank W. Gwathmey, E. A. Smith, and William A. North-
[fol. 139] cutt for carriers in southern group; W. F. Dickinson, R. V. Fletcher, Ben C. Dey, J. R. Bell, D. F. Lyons, M. L. Countryman, jr., M. G. Roberts, Walter McFarland, J. M. Souby, Leslie Craven, P. F. Gault, J. N. Davis, L. H. Strasser, and H. H. Larimore for carriers in western group, also certain carriers by water; H. E. McGee and George T. Atkins for Missouri-Kansas-Texas lines; A. J. Laughon, O. P. Kellogg, F. N. Hicks, and M. L. Bluhm for Chicago, Milwaukee, St. Paul & Pacific Railroad Company; A. S.

Halsted, E. E. Bennett, E. C. Renwick, Charles A. Root, and W. Hal Farr for Union Pacific lines; C. D. Bordelon and Harry R. Jones for Gulf Coast Lines, and International-Great Northern; B. F. Batts and J. C. Winfield for St. Louis Southwestern Railway lines; Fred L. Wallace and L. M. Hogsett for Fort Worth & Denver City Railway Company; S. G. Reed for Texas & New Orleans Railroad; F. R. Newman for Minneapolis, St. Paul & Sault Ste. Marie Railway Company; W. H. Bremner for Minneapolis & St. Louis Railroad Company; James E. Taussig and N. S. Brown for Wabash Railway Company; Ben B. Cain, and Clarence A. Miller for Christie & Eastern Railway Company, Sabine & Neches Valley Railway Company, and LaSalle & Bureau County Railway Company; W. E. Coman, F. A. Cleveland, Thomas H. Maguire, and R. E. Smith for Northern Pacific Railway Company, J. E. Gorman, A. Mackenzie, and George E. Schnitzer for Chicago, Rock Island & Pacific Railway Company, and Chicago, Rock Island & Gulf Railway Company; B. S. Atkinson, sr., for Louisiana & Arkansas Railway Company and Louisiana, Arkansas & Texas Railway Company; W. G. Baird for Chicago & Alton Railroad; Thomas Balmer for Great Northern Railway Company; Alfred A. Hampson and Robert M. Kerr for Southern Pacific Company; Robert Thompson, J. A. Lynch, and C. M. Spence for Texas & Pacific Railway Company and subsidiary lines; C. D. Cass for American Electric Railway Association.

Ralph R. Bradley for Cincinnati & Lake Erie Railroad Company, Indiana Railroad, Indiana Service Corporation, Public Service Corporation, Public Service Company of Indiana, Northern Indiana Power Company, Fort Wayne-Lima Railroad Company, Chicago, North Shore & Milwaukee Railroad Company, Chicago, South Shore & South Bend Railroad, and Chicago, Aurora & Elgin Railroad Company; A. R. Yarborough for Alabama Central Railway, Kanawha Central Railway Company, Stroud's Creek & Muddlety Railroad Company, and Winifrede Railway Company; William S. Bronson and W. W. Ahrens for Virginia Central Railway; C. F. Taplin and William S. Bronson for Pittsburgh & West Virginia Railway Company; A. E. Wallace for Duluth, South Shore & Atlantic Railway Company; Guy V. Shoup and J. R. Bell for Visalia Electric Railroad Company, [fol. 140] Fresno Traction Company, and Peninsular Railway Company; Arthur Van Meter for Monongahela Rail-

way Company and Pittsburgh, Chartiers & Youghiogheny Railway Company; James W. Carmalt for Pacific & Idaho Northern Railway Company; Frederick E. Brown for Manufacturers Railway Company and St. Louis & O'Fallon Railway Company; Ben B. Cain and Clarence A. Miller for various short lines; J. B. Dempsey for West Virginia Midland Railway Company; L. E. Earlywein for certain electric-railway carriers in C. F. A. territory; William T. Faricy for Minnesota Transfer Railway Company; W. L. Meyers for certain electric railroads; William Jay Turner and George P. Orlady for Lehigh & New England Railroad Company; W. H. Weeks for Kansas City Connecting Railroad Company; A. E. Morris for Texas Electric Railway; S. P. Collier for Winston-Salem Southbound Railway Company; J. S. Babbitt for Sand Springs Railway Company; Frank Lyon for Luckenbach Steamship Company, Luckenbach Gulf Steamship Company, and American Hawaiian Steamship Company; J. C. Gillespie for Nicholson Universal Steamship Company; Ralph S. Fowler for Gulf Pacific Line, Limited, and Swayne & Hoyt, Limited; Frank W. Sullivan for Great Lakes Transit Corporation; C. E. Dempsey for Cleveland & Buffalo Transit Company; A. R. Sheff for Minnesota-Atlantic Transit Company; George B. Wright for Detroit & Cleveland Navigation Company.

Hughes, Schurman & Dwight, Charles E. Hughes, jr., Fred N. Oliver, and Frederick W. R. Pride for security holders' committee on the railroad emergency; Root, Clark & Buckner, Grenville Clark, Henry J. Friendly, and Jeremiah M. Evarts for emergency committee on railroad investments of life-insurance companies and mutual savings banks.

John E. Benton and Clyde S. Bailey for legal committee of Western States' commissions and certain other State commissions; Joseph E. Warner and Donald C. Starr for Commonwealth of Massachusetts; Ralph W. Davis for State of New Hampshire; John A. Bernhard for Board of Public Utilities Commissioners of New Jersey; L. J. Dorr for New York State Department of Agriculture and Markets; J. W. Herrold, Gilbert Bettman, and T. J. Herbert for Public Utilities Commission of Ohio; G. H. Shafer, J. Paul Kuhn, and C. W. Hadley for Illinois Commerce Commission; Hugh E. Wilson, F. M. Wintermute, R. H. Dunn, and K. F. Clardy for Michigan Public Utilities Commission; John C. Goddin for State of Virginia, Department of Agriculture; H. E.

Ketner for Corporation Commission of Virginia; W. G. Womble for North Carolina Corporation Commission; W. L. Glaze for South Carolina State Highway Department; E. M. Price for Georgia Public Service Commission; J. W. [fol. 141] Cammack, Moses R. Glenn, Oscar Vest, Thos. H. Lauhon, Douglas C. Vest, M. B. Holifield, Chas. Satterfield, and L. F. Orr for Railroad Commission of Kentucky and Commonwealth of Kentucky; W. F. Barry, jr., J. O. Hendley, and John L. Nealy, sr., for State of Tennesssee; T. T. Turnbull, Fred Pettijohn, and J. H. Tench for Florida Railroad Commission; Frank E. Harrison, jr., for State Road Department of Florida, Board of Commissioners of State Institutions, Floridin Connty, and City of Tallahassee, Fla.; Geo. Butler and M. C. Moore for Mississippi Railroad Commission; Amos A. Betts, Loren Vaughn, E. A. Howe, L. G. Reif, and Charles E. Blaine for Arizona Corporation Commission; J. F. Shaughnessy for Nevada Public Service Commission; J. M. Devers for Oregon State Highway Commission; C. M. Thomas and A. F. Harvey for Public Utilities Commission of Oregon; E. E. Corfman for Public Utilities Commission of Utah; F. Chatterton for Public Service Commission of Wyoming; John H. Dunbar, C. R. Lonergan, John C. Hurspool, and Fred K. Baker for Washington Department of Public Works; Francis A. Silver for Board of Railroad Commissioners of Montana; J. D. Rigney, M. Reese Hattabaugh, Bert L. Penn, Maurice H. Greene, and Fred J. Babcock for Public Utilities Commission of Idaho; Arthur T. George, Ira H. Rowell, Roderick B. Cassidy, and W. P. Geary for California Railroad Commission; C. A. Ross, Hugh LaMaster, and C. A. Sorenson for State of Nebraska; Clarence L. Ireland for State of Colorado; Henry N. Benson, John F. Bonner, O. P. B. Jacobson, Frank W. Matson, Christian J. Laurisch, and L. H. Bitley for State of Minnesota, and Minnesota Railroad and Warehouse Commission; V. E. Smart for Missouri Public Service Commission; E. H. Hatcher, C. W. Steiger, I. C. Peterson, and Wylie McNeal for Public Service Commission of Kansas; Philip H. Porter for Public Service Commission of Wisconsin, and various Wisconsin industries; William F. Ehmann for Public Service Commission of Wisconsin; Herman L. Bode, J. J. Murphy, and D. L. Kelley for State of South Dakota; J. H. Henderson, C. B. Ellis, and W. F. Parsons for Board of Railroad Commissioners of Iowa; Ben C. Larkin,

C. W. McDonnell, Fay Harding, E. M. Hendricks, F. P. Aughnay, and Rex E. Willard for Board of Railroad Commissioners of North Dakota; Reece Caudle, L. R. Wood, and A. D. Beals for Arkansas Railroad Commission; C. B. Bee and H. H. Dunlap, jr., for Traffic Department of Oklahoma Corporation Commission.

James M. Curley, mayor, for city of Boston, Mass.; Samuel Silverman and Johnston B. Campbell for Boston, Mass., Port Authority; W. H. Chandler for Merchants' Association of New York, N. Y., and New York State Chamber of Commerce with respect to port differentials; Julius Henry [fol. 142] Cohen for Port of New York Authority; T. C. Crouch for Richmond, Va., Chamber of Commerce; Frank S. Davis for Maritime Association of Boston, Mass., Chamber of Commerce; William H. Day for Boston, Mass., Chamber of Commerce, New England Traffic League, and New Bedford, Mass., Board of Commerce; Charles J. Fagg for Newark, N. J., Chamber of Commerce, and New Jersey traffic advisory committee; A. H. Ferguson for New Bedford, Mass., Board of Commerce; John Philip Hill for East Baltimore, Md., Business Men's Association; Charles R. Seal for Baltimore, Md., Association of Commerce; George S. Hobbs for Maine State Chamber of Commerce and Agricultural League; A. P. Lane for Millinocket, Me., Chamber of Commerce and Great Northern Paper Company; Donald O. Moore for Pittsburgh, Pa., Chamber of Commerce; C. M. Mark for Newport News, Va., Chamber of Commerce; M. F. Price for Manufacturing Association of Connecticut, and Hartford Chamber of Commerce; Claude H. Swain for Concord, N. H., Chamber of Commerce; S. H. Williams for Philadelphia, Pa., Chamber of Commerce; Frederick M. Varah for Syracuse, N. Y., Chamber of Commerce; Thomas M. Woodward and T. D. Geoghegan for Southwest Virginia, Incorporated; Howard H. Waldron for Portland, Me., Chamber of Commerce; Andrew H. Brown for Cleveland, Ohio, Chamber of Commerce; A. J. Christiansen for Moline, Ill., Association of Commerce and Illinois District Traffic League; John C. Graham for Jackson, Mich., Traffic Bureau; H. D. Rhodehouse, A. C. Graham, J. C. Argetsinger, and J. V. McMahon for Youngstown, Ohio, Chamber of Commerce; A. B. Coapstick for Indiana State Chamber of Commerce and Indiana Division National Association of Natural Stone Producers; Fred E. Young for South Bend, Ind.,

Chamber of Commerce; O. B. Eddy for Peoria, Ill., Association of Commerce and Illinois District Traffic League; Samuel Herndon for Cincinnati, Ohio, Chamber of Commerce; H. A. Hollopeter for Terre Haute, Ind., manufacturers; C. E. Hochstedler for Chicago, Ill., Association of Commerce; Herbert J. Campbell and J. S. Brown for Chicago, Ill., Board of Trade; Clare B. Tefft for Toledo, Ohio, Chamber of Commerce; John A. Forshey for Toledo, Ohio, Board of Trade; Thomas E. Grady and John A. O'Rourke for Miami, Fla., Rate & Traffic Board, Broward Port Authority, Broward County Rate & Traffic Board; T. C. Elliott for Interior Florida Traffic Bureau and Florida League of Municipalities; E. J. Gosgrove, jr., for city of St. Petersburg and Pinellas County, Fla.; Joseph H. Donnell for Tampa, Fla., Chamber of Commerce, Tampa Traffic Association, and Florida League of Municipalities; A. F. Vandegrift for Louisville, Ky., Board of Trade; T. M. Henderson for Traffic Bureau of Nashville, Tenn.; H. A. Hopkins for Anniston, Ala., Traffic Bureau and United Chambers of [fol. 143] Commerce; C. E. Jones for Birmingham, Ala., Traffic Association; M. M. Caskie and J. D. Oliver for Montgomery, Ala., Chamber of Commerce and Alabama Farm Bureau Federation; J. O. Cromwell for Macon, Ga., Chamber of Commerce; Thos. J. Burke for Charleston, S. C., Traffic Bureau and Southern Traffic League; Edgar Moulton for New Orleans, La., Joint Traffic Bureau; J. C. Murray for Little Rock, Ark., Chamber of Commerce and Arkansas Cotton Trade Association; Homer J. Conley for Fort Smith, Ark., Freight Bureau; I. B. Bentley for Oklahoma City, Okla., Jobbers & Manufacturers' Association, and Oklahoma City Chamber of Commerce; Ed P. Byars for Fort Worth, Tex., Chamber of Commerce, Fort Worth Freight Bureau, and Texas Wholesale Fruit & Vegetable Dealers' Association; E. R. Tanner for New Mexico State Farm Bureau, El Paso, Tex., Freight Bureau, and El Paso Chamber of Commerce; E. R. Tanner and D. H. Berry for West Texas Chamber of Commerce and San Angelo Board of City Development; S. J. Cole for Amarillo, Tex., Chamber of Commerce, Amarillo Board of City Development, Chamber of Commerce of Levelland, Canadian, Sherman County, Cattle County, Hereford, and Clarendon, Tex.; J. W. Chatham for East Texas Chamber of Commerce; Dudley B. Foy for Wichita Falls, Tex., Chamber of Com-

merce, and Wichita Falls Petroleum Traffic Association; U. S. Pawkett for San Antonio, Tex., Freight Bureau, San Antonio Chamber of Commerce, Winter Garden Chamber of Commerce, and South Texas Chamber of Commerce; A. L. Reed for Dallas, Tex., Chamber of Commerce; L. M. Shepardson for Waco, Tex., Chamber of Commerce; E. H. Thornton for Chamber of Commerce & Cotton Exchange of Galveston, and Texas City, Tex., Board of Trade; A. E. Hueneryager for Zion, Ill., Institutions and Industries, Incorporated; John R. Davy for Sheboygan, Wis., Association of Commerce; L. E. Luth for Winona Association of Commerce, and LaCrosse, Wis., Chamber of Commerce; C. C. Campbell for Oshkosh, Wis., Chamber of Commerce; H. W. Kehrke for Milwaukee, Wis., Association of Commerce; Herman Mueller for St. Paul, Minn., Association of Commerce, and shippers of St. Paul, Minn.; Fred S. Keiser for Duluth, Minn., Chamber of Commerce; Chas. H. Winslow for Kalamazoo, Mich., Chamber of Commerce; Leo E. Golden for Grand Rapids, Mich, Association of Commerce, Grand Rapids Furniture Manufacturers Association, Grand Rapids Coal Merchants Exchange, Burlington, Iowa, Shippers Association, Tell City, Ind., Traffic Association, Hannibal, Mo., Traffic Association, National Retail Furniture Association, for Iowa Malleable Iron Company; Geo. M. Cummins for Davenport, Iowa, Chamber of Commerce; W. H. Fitzpatrick for St. Joseph, Mo., Chamber of Commerce; S. W. W. Carr for Aberdeen, S. Dak., Chamber of Commerce; H. M. Rickards for Hutchinson, Kans., Cham- [fol. 144] ber of Commerce; George E. Hogle for Hutchinson, Kans., Board of Trade Association; A. M. Corp for Wichita, Kans., Chamber of Commerce, Kansas Chamber of Commerce, and Wichita Union Stock Yards Company; C. F. Real for Topeka, Kans., Chamber of Commerce; F. P. Willette for Atchison, Kans., Chamber of Commerce; H. M. Hancock for Salina, Kans., Chamber of Commerce; H. R. Brashear for Los Angeles, Calif., Chamber of Commerce; Hal Remington for San Francisco, Calif., Chamber of Commerce; Thomas S. Loutitt and J. C. Sommers for Stockton, Calif, Chamber of Commerce; Edwin G. Wilcox for Oakland, Calif., Chamber of Commerce; E. H. Walker for Reno, Nev., Chamber of Commerce; J. H. Tedrow for Kansas City, Mo., Chamber of Commerce and various industries at Kansas City.

Luther M. Walter, R. C. Fulbright, W. J. Mathey, R. W. Poteet, Chas. R. Seal, H. J. Wagner, W. H. Chandler, W. H. Day, and Herman Mueller for National Industrial Traffic League; Henry J. Balzer and Russell G. Stidolph for National Traffic Association; Milton P. Bauman for New Jersey traffic advisory committee, and New Jersey Industrial Traffic League; William J. Mathey for Shippers Conference of Greater New York; G. Coe Farrier for Allied Commercial Bodies of Philadelphia; J. M. Davison for commercial traffic managers of Philadelphia; J. J. Cummings for New Hampshire Manufacturers' Association; Morris W. Ford and John J. Hickey for Manufacturers Association of Connecticut, Incorporated; Morgan Richards for Selma, Ala., Traffic Bureau; Harry T. Moore and E. L. Hart for Atlanta Freight Bureau; Charles E. Cotterill, Joseph Hopkins, and William Ward, jr., for Southern Traffic League; W. B. Kreuger for Piedmont Southern Freight Bureau; I. M. Bailey and W. S. Creighton for North Carolina Traffic League; H. J. Wagner and H. V. C. Wade for Norfolk Port Traffic Commission; J. B. Jones for Southside Virginia Just Freight Rate Association; H. E. Manghum for Virginia Shippers' Association; F. C. Hillyer for Jacksonville, Fla., Traffic Bureau, Brunswick, Ga., Traffic Bureau, United States Fisheries Association, Cast Stone Institute, Canadian Paint, Oil & Varnish Association, Naval Stores Industry of South Atlantic States, McLaren Rubber Company, and certain rice mills and rice producers; Geo. M. Cummins for Illinois District Traffic League; R. J. Dellinger for Western Stoneware Company, and Illinois District Traffic League; Geo. M. Cummins and L. E. Behrens for Muscatine Shippers Association; Fytte & Clarke, David R. Clarke, James L. Donnelly, and R. I. Pierce for Illinois Manufacturers Association; C. E. Elerick for Cadillac, Mich., Manufacturers Exchange; R. I. Pierce for Manufacturers Association of Chicago Heights; Frank Leffingwell for Southwestern Industrial Traffic League and Texas Industrial [fol. 145] Traffic League; F. E. Potts for Helena, Ark., Traffic Bureau; W. A. Curtin for Portland Traffic & Transportation Association; Bert L. Baker for Wenatchee Valley Traffic Association; Ivan L. Plette, for Yakima Valley Traffic and Credit Association; William P. Ellis for Yakima Valley Traffic & Credit Association, Wenatchee

Valley Traffic Association, Hood River Traffic Association, Rogue River Valley Traffic Association, and Fruit Growers' League; G. C. Early, J. S. Earley, and E. C. Fanbert for Utah Shippers Traffic Association; Frank M. Hill for Fresno Traffic Association; Wm. C. McCulloch for Portland, Oreg., Traffic & Transportation Association.

R. C. Allen for Lake Superior Iron Ore Association; E. S. Ballard for Lake Superior Iron Ore Association; C. T. Bradford for International Harvester Company and Wisconsin Steel Company; William W. Collin, jr., for Jones & Laughlin Steel Corporation; E. M. Cole for American Cast Iron Pipe Company, Alabama Iron & Steel Shippers Conference, and Cast Iron Pipe Committee; J. M. Davison for American Pulley Company, Moore & White Company, Bond Foundry & Machine Company, Standard Pressed Steel Company, T. B. Woods Sons Company, and Rogersford Foundry & Machine Company; E. O. Foubert for Pacific States Cast Iron Pipe Company of Provo, Utah; W. J. Hammond for Inland Steel Company; J. H. Hiltner for United States Pipe & Foundry Company; J. C. Hunting for American Chain Company, Incorporated, and associate companies; W. B. Lewis for Sloss Sheffield Steel & Iron Company; F. M. Manson for Lukens Steel Company; Roy A. McCaffrey for United States Pipe & Foundry Company; J. D. Oliver and A. J. Ribe for Alabama Iron & Steel Shippers Conference, Southern Association of Stone Manufacturers, Birmingham Slag Company, and Montgomery Gravel Company, and others; Thaxton Richardson for Carolina Steel & Iron Company; Edwing H. Scott for Andrews Steel Company, Newport Rolling Mill Company, Globe Iron Roofing & Corrugating Company, and Hardy Burlingham Coal Company; A. B. Tanner for Lake Superior Iron Ore Association; E. E. Williamson for Andrews Steel Company, Newport Rolling Mill Company, Globe Iron Roofing & Corrugating Company, and Hardy Burlingham Coal Company.

H. O. Berger for Western Washington log shippers; Frank Carnahan for Southern Hardwood Traffic Association and affiliated companies; Wilson Compton for National Lumber Manufacturers' Association; Clapp, Elmquist, Briggs, Gilbert, Macartney for Weyerhaeuser interests; Fayette B. Dow for American Veneer Package Association and Standard Container Manufacturers' Asso-

ciation; Roy H. Dahlberg for Edham Shingle Company; J. A. Edgecumbe for Edham Shingle Company; R. C. Full-
[fol. 146] bright for Southern Pine Association, Phelps Dodge Corporation, and Calumet & Arizona Mining Company; Hugh A. Gillis for Western Pine Manufacturers' Association; R. J. Henderson for National Pole & Treating Company; Irwin Huseby for Northwestern Lumbermen's Association; A. Larsson for California Pine Box Distributors, California Redwood Association, California White & Sugar Pine Manufacturers' Association, Red River Lumber Company, American Box Company, and other pine producers in southern Oregon and California; A. G. T. Moore for Southern Pine Association; William C. McCulloch and William B. Adams for West Coast Lumbermen's Association, Portland Traffic & Transportation Association, Red River Lumber Company, California Lumbermen's Association, California White & Sugar Pine Association, McCloud River Lumber Company, and California Pine Box Distributors; J. V. Norman for Southern Hardwood Traffic Association, Property Owners Committee, and West Kentucky Coal Bureau; Walter A. Powers for Main Lumbermen & Land Owners' Association; H. N. Proebstel and Wm. B. Greeley for West Coast Lumbermen's Association; J. H. Townsend for Southern Hardwood Traffic Association, and Hardwood Manufacturing Institute; W. W. Weller for Weyerhaeuser Timber Company; S. J. Wettrick for western lumber interests and North Pacific Millers Association.

A. S. Boden for Western Pennsylvania Coal Traffic Bureau; Ernest S. Ballard and D. F. Hurd for Ohio Lake Cargo Coal Rate Committee, and Ohio Coal Producers Freight Rate Committee; C. B. Cardy and L. F. Malum for Springfield, Ill., Coal Traffic Bureau; Joseph O'Toole and Ira C. Cochran for various coal associations; William B. Faulkner for Donner-Hanna Coke Corporation; August G. Gutheim for Central Pennsylvania Coal Producers Association, Western Pennsylvania Coal Traffic Bureau, C. Reiss Coal Company, and Milwaukee Western Fuel Company; J. F. Graves for Consolidated Coal Company; T. T. Harkrader for American Tobacco Company; Arthur Hale for Coal Exporters Association of United States; John J. Hickey for Anthracite Coal Operators Association and Manufacturers Association of Connecticut, Incorporated;

S. C. Higgins for New River Coal Operators' Association; Stanley B. Houck for Twin City Coal Exchange, Incorporated; C. P. Hoy for Fifth & Ninth Districts Coal Traffic Bureau; W. A. Jones for Central Pennsylvania Coal Producers Association; Kirkland, Fleming, Green & Martin for Chicago Coal Merchants Association; Wesley E. Keller for Northwestern Retail Coal Dealers' Association; A. M. Liveright for Central Pennsylvania Coal Producers' Association, and others; John C. Ryan for Coal Merchants Educational Bureau; F. O. Sandstrom for Colorado & New Mexico Coal Operators' Association; Fred H. Sturm for [fol. 147] Montana Commercial Coal Operators, Anaconda Copper Mining & Coal Department, Bair Collins Company, Jeffries Coal Mining Company, Montana Coal & Iron Company, and Roundup Coal Mining Company; C. E. Warner and H. J. Goudelock for Midwest Coal Traffic Bureau; W. Y. Wildman for Illinois Coal Traffic Bureau.

Michael J. Anuta for Menominee Chamber of Commerce, Marinette Industrial Board, and Badger Paper Mills, Incorporated; J. E. Bryan and C. R. Hillyer for Wisconsin Paper & Pulp Manufacturers Traffic Association; W. B. Dalton for Nekoosa Edwards Paper Company; Charles E. Bell and C. C. Furgason for West Virginia Pulp & Paper Company; Laurence E. Daspit for Brown Paper Mill Company, Incorporated; James F. Dougherty for Michigan Paper Mills Traffic Association; F. L. Grady for Mead Paperboard Corporation; R. J. Henderson for Minnesota & Ontario Paper Company; F. M. Ives for National Association of Cotton Manufacturers; J. H. Krueger for Watab Paper Company; H. A. Manning for Atlanta Paper Company; Andrew P. Lane for Great Northern Paper Company, St. Croix Paper Company, Madison, Me., Chamber of Commerce, and Millinocket, Me., Chamber of Commerce; Parker McCollester and Lord, Day & Lord for American Newspaper Publishers Association, Publishers Association of New York City, and American Zinc Institute; William J. Mathey for American Newspaper Publishers Association; O. J. McSwain for Albemarle Paper Manufacturing Company, Albemarle Chesapeake Company, and Chesapeake Corporation; John J. Seid for Pacific Pulp & Paper Traffic Association, and Pacific Coast Association of Pulp & Paper Manufacturers; Sheldon E. Wardwell and Andrew P. Lane for Great Northern Paper Company, St. Croix Pa-

per Company, Madison Chamber of Commerce, and Millinocket, Me., Chamber of Commerce; F. M. Ives and C. L. Whittemore for New England Paper & Pulp Traffic Association; W. N. Webb for Celotex Company.

Edson Abel for California Farm Bureau Federation; Charles O. Busick for California State Grange; Charles E. Blaine for American National Livestock Association and Apache Powder Company; E. S. Briggs for American Fruit & Vegetable Shippers Association; William C. Bewley for Georgia Peach Growers Exchange; George C. Conn for Fruit Industries, Limited; Edw. G. Davies for fruit and vegetable shippers of Mississippi Valley; H. A. Davis for Boston Wool Trade Association; A. H. Priest, Dayton Moses, and H. D. Driscoll for southwestern livestock interests; Wm. B. Daly for Kroger Grocery & Baking Company; J. S. Earley for Utah State Beekeepers Association, Utah Manufacturers Association, Utah Horticultural Association, Utah State Farm Bureau, Utah Poultry Producers [fol. 148] Cooperative Association, and Ogden Grain Exchange; E. J. Forman for Los Angeles Grain Exchange; Arthur M. Geary for Farm Rate Council, North Pacific Grain Growers, Incorporated, Eastern Oregon Wheat League, and Northwestern Livestock Shippers Traffic League; T. D. Geoghegan for West Virginia Live Stock Growers & Shippers, and R. W. Burch, Incorporated; R. M. Gilliland for American Wholesale Grocers' Association, Virginia State Horticultural Society, and West Virginia Horticultural Society; C. O. Cornwell, George E. Farrand, and Karl D. Loos for California Citrus League; Dow, Crane & Lohnes for Joint Council of International Apple Association, and other fruit interests; C. R. Hillyer and Waldo P. Johnson for Live Poultry Shippers Association; S. T. Henson for Feed Manufacturers' Traffic Committee; H. R. Higgins for Dried Fruit Association of California; Donald Kirkpatrick for American Farm Bureau Federation; McKinley Huntington for Oregon Turkey Growers; Geo. C. Lambert for various grain cooperatives; Slaughter Linthicum for Thompson-Weinman & Company, Incorporated, and Southeastern Peanut Association; J. H. Mercer for Kansas Live Stock Association; C. B. Moore, Robert M. Barker, and Hal F. Wiggins for Western Growers Protective Association of California & Arizona; C. R. Marshall

and J. Curtis Robinson for Growers & Shippers League of Florida; F. R. Marshall, H. W. Prickett, and Milton H. Love for National Wool-growers Association; Robert Mayer and A. J. Stone for Dallas Cotton Exchange; John E. McCurdy for Poultry Producers of Central California; Wm. J. Maloney for Corn Exchange; Allan P. Matthew, John O. Moran, F. W. Mielke, J. Richard Townsend, and McCutchen, Olney, Mannon & Greene for California Growers' & Shippers' Protective League; F. H. Nesmith for Ralston Purina Company; O. E. Nelson for Denver Alfalfa Milling & Products Company, Lamar Alfalfa Milling Co., Holly Alfalfa Milling Company, and Lamar Chamber of Commerce; Thos. O'Neill for California Vegetable Union; Donald S. Payson for American Seed Trade Association, Southern Seedmen's Association, and Pacific States Seedsmen's Association; H. W. Prickett, Stephen H. Love, and Milton H. Love for Intermediate Rate Association, National Wool Growers Association, and various firms; Lee J. Quasey for National Live Stock Marketing Association; J. Curtis Robinson for Growers & Shippers League of Florida; C. M. Reed for various farm organizations, and 14 national and State organizations; O. W. Sandberg for American Farm Bureau Federation; Anthony E. Sicilia for Midwest Wool Trade Association; E. B. Smith for Sperry Flour Company and California Hay, Grain & Feed Dealers Association; L. H. Stewart for California Arizona Cotton Association; W. R. Scott [fol. 149] and J. W. Halloway for Board of Trade of Kansas City, Mo., J. C. Suttie for National Hay Association and Omaha Hay Association; W. S. Turner for Arkansas Cotton Trade Association; O. W. Tong for Minnesota Canners Association, Maine Potato Growers & Shippers Association, and Northern Potato Traffic Association; Warren H. Wagner, C. O. Dawson, H. W. Davis, and C. A. Heath for Interior Iowa Packers; Raymond Williams and E. J. Theisen for New York State Hay & Grain Dealers' Association.

E. M. Burns for Northwest Canners' Association, Northwest Fruit Barrelers' Association, and Vinegar Manufacturers' Association; Paul E. Blanchard and W. W. Manker for Armour & Company; J. L. Carling for Arbuckle Brothers; Frank M. Cooke for Jacob Dold Packing Company; Jos. C. Colquitt and R. E. Cook for H. J. Heinz Company; C. S. Connolly for Carnation Company of California, and

Albers Brothers Milling Company; Edward S. DePass for Evaporated Milk Association; H. D. Driscoll for Oklahoma Millers' Association; M. M. Emmert for Coca Cola Company; J. Harry Covington and Spencer Gordon for National Canners Association; M. A. Gray for H. D. Lee Mercantile Company; C. A. Heath for Rath Packing Company; W. T. Hickerson for American Salt Corporation, Carey Salt Company, and Barton Salt Company; E. T. Hadley for Borden Company; M. S. Hartman for Fairmont Creamery Company; E. H. Hogueland, Thad L. Hoffman, and I. M. Herndon for Southwestern Millers' League; Irving F. Lyons for Canners League of California, and Utah Canners' Association; R. D. Lytle for North Pacific Millers' Association; M. H. Love for Amalgamated Sugar Company, Holly Sugar Company, Springville-Mapleton Sugar Company, Gunnison Sugar Company, Layton Sugar Company, and Utah-Idaho Sugar Company; B. F. McKennen for Pacific States Butter, Egg, Cheese, & Poultry Association; Ralph Merriam for Morton Salt Company; Wm. R. Moore for National Confectioners Association of United States, and Eastern Confectioners' Traffic Bureau; H. V. McNamara for Western Sugar Refinery; G. A. Nimmo for Planters Nut & Chocolate Company, and Suffolk, Va., Chamber of Commerce; V. K. Raymond for National Sugar Refining Company of New Jersey; Fred M. Renshaw and Charles G. Redlick for Jacob Dold Packing Company; P. M. Ripley for American Sugar Refining Company; E. F. Scott for American Association of Creamery Butter Manufacturers, and National Poultry, Butter & Egg Association; Claude E. Street for Florida Grapefruit Canners Association; V. Schaffenburg for Myles Salt Company, Limited, and Bay Chemical Company, Incorporated; F. L. Thomas and H. R. Burr for Wisconsin Canners' Association; W. J. Tomkins for Diamond Crystal Salt Company, Colonial Salt Com-
[fol. 150] pany, Ohio Salt Company, and Union Salt Company; George Turner for Land of Lakes Creameries; Lynne P. Townsend for New England Retail Grain Dealers' Association; Elmer Westlake and J. G. Breslin for Western Sugar Refinery, and California & Hawaiian Sugar Refining Corporation, Limited; L. Z. Whitback for Great Atlantic & Pacific Tea Company.

J. E. Barnhard for St. Joseph Lead Company, M. M. Caskie for Reynolds Metals Company, Stokeley Brothers

& Co., and Fulton Sylphon Company; P. A. Champney for American Can Company; John L. Finerty for American Smelting & Refining Company, and National Sugar Refining Company of New Jersey; H. A. Gray for Eagle Picher Lead Company; Russell G. Lucas for Utah Copper Company, Nevada Consolidated Copper Company, and Utah Chapter, American Mining Congress; William A. Moore for New Jersey Zinc Company, New Jersey Zinc Sales Company, New Jersey Zinc Company (of Pennsylvania), Empire Zinc Company, Mineral Point Zinc Company, and Bertha Mineral Company; Robert E. Quirk for Anaconda Copper Mining Company, International Smelting Company, Inspiration Consolidated Copper Company, Green Cananea Copper Mining Company, and American Brass Company; Walter A. Smith for New Jersey Zinc Company; Frank M. Swacker for New Jersey Zinc Company, New Jersey Zinc Sales Company, Mineral Point Zinc Company, Bertha Mineral Company, Empire Zinc Company, and Chestnut Ridge Railway Company; Luther M. Walter, John S. Burchmore, and Nuel D. Belnap for National Crushed Stone Association, Tri-State Zinc & Lead Ore Producers Association, Eagle-Picher Lead Company, and St. Joseph Lead Company; S. L. Yerkes for Alabama Mining Institute.

Benjamin J. Brooks for National Granite Commission; Homer J. Conley for Fort Smith Traffic Bureau and Carthage Marble Corporation; H. H. Bieze for Indiana Division National Association of Natural Stone Producers; J. Raymond Hoover for Vermont Marble Company; Frank H. Luther for Washington Building Lime Company, and Standard Lime & Stone Company; J. Prince Webster for Georgia Limerock Company; E. E. Williamson for Limestone Products Corporation of America; V. E. Anderson for southwestern glass interests; J. A. Bernier for Kerr Glass Manufacturing Corporation, Alex. H. Kerr & Company, Incorporated, and Kerr, Hubbard & Kelley; Jos. C. Colquitt and J. C. Magness for Glass Container Association of America; James C. Davie for Illuminating Glassware Guild; Jacob Mauiss for Phillips Glass Corporation, and Mission Orange, Incorporated; H. D. Musick for Blue Ridge Glass Corporation, and Kingsport Press, Incorporated.

[Vol. 151] George J. Bolender for Paper Makers Chemical Corporation, C. K. Williams & Company, Vera Chemical Company of Canada, Limited, George S. Mepham & Company, Superior Pine Products Company, and Seminole Pigments Company; E. C. Blanchard, John R. Meeks, and L. B. Rockwell for North Alabama Utilities Company, Decatur Fertilizer Company, Farmers' Fertilizer Company, Chase Nursery Company, Dixie Syrup Company, Alabama Asphaltic Limestone Company, Dixie Minerals Corporation, and Ware Brothers Agency; Harold R. Hendrick for Cincinnati Chemical Works, Incorporated; M. H. Haertel for Wood Chemical Institute, Incorporated; P. L. Hollingsworth for American Potash & Chemical Corporation, and Three Elephant Borax Corporation; John H. C. Kirk for Darling & Company; Harry C. Ames and Warren N. Watson for Manufacturing Chemists Association of America; A. D. Whittemore, C. A. Fulton, and F. G. Moore for Phosphate American Agricultural Corporation, Southern Phosphate Corporation, Phosphate Mining Company, Coronet Phosphate Company, and Florida Pebble Phosphate Export Association; T. J. Burke, D. A. Dashiell, J. H. Hunt, F. G. Moore, F. B. Porter, and A. D. Whittemore for numerous fertilizer manufacturers and shippers; A. J. Young for International Agricultural Corporation.

E. N. Adams for Tulsa, Okla., interests; R. C. Allen for Nogleby-Norton Company; J. F. Atwater for American Hardware Corporation; Smith W. Brookhart for himself; E. A. Barror for Valvoline Oil Company; Nuel D. Belnap for National Crushed Stone Association; C. A. Barinowski for Birmingham Slag Company, Montgomery Gravel Company, Woodstock Slag Corporation, Tennessee Valley Sand & Gravel Company, and Stockbridge Stone Company; C. S. Bather for Rockford Manufacturers & Shippers Association, Rockford Furniture Manufacturers Association, National Association of Furniture Manufacturers, and Better Bedding Alliance of America; H. L. Burch for Kentucky Rock Asphalt Company; W. S. Barton for Ash Grove Lime & Portland Cement Company; W. A. Cook for Merry Brothers Brick & Tile Company; Joseph W. Connolly for Ford Motor Company; Jos. C. Colquitt and J. T. Ryan for Southern Furniture Manufacturers' Association; H. L. Crowder for Pennsylvania Salt Manufacturing Company; Geo. M. Cummins and A. R. Ebi for Deere & Company; W.

G. Clayton, Jr., for Buffalo Holt Company and New System Traffic Service; Edward H. Cooley for Massachusetts Fishing Industry; C. W. Chears for cotton mills; Carl R. Cunningham and L. O. Kuisherly, Jr., for American Cotton Manufacturers Association, Cotton Manufacturers Association of North Carolina, and Cotton Manufacturers Association of South Carolina; Willis Crane for 22 oil-refining companies; Lee R. Cowles for Kansas Oil Traffic [fol. 152] Committee and White Eagle Oil Corporation; L. N. Conyers for Pennsylvania Petroleum Company; Fayette B. Dow and Dow, Crane & Lohnes for National Sand & Gravel Association, and various other sand and gravel associations; Benj. S. Dowdell for Hummel-Ross Fibre Corporation; George A. Duffy for Walton & Company, Incorporated; Roy H. Dahlberg for Shevlin, Carpenter & Clarke Company; C. L. Denk, Jr., for Fulton Bag & Cotton Mill; J. H. Davenport for Wichita Falls Petroleum Traffic Association; C. F. Dowd for Tidal Refining Company, Tidal-Western Oil Corporation, Wilcox Oil & Gas Company, and Cushing Refining & Gasoline Company; C. D. Dooley for Colgate Palmolive Peet Company; E. W. Dallman for Blatz Brewing Company; F. A. Doebber for Citizens Gas Company of Indianapolis.

W. F. Everding for Brown Company; M. W. Eismann for Manufacturers Association of Erie; R. A. Ellison for Associated Producers of Cereal Beverages and Burger Brothers Company; Bernard L. Glover for Iola Cement Mills Traffic Association, Standard Briquette Fuel Company, Phenix Marble Company, Industrial Paper Company, and Missouri Mapes Company; E. S. Gubernator and F. E. Paulson for Lehigh Portland Cement Company and other cement companies; James S. Gill for Upson Company, and Lockport Board of Commerce; J. S. Geiger for United States Brewing Company of Chicago; D. P. Harris for Southwest Clay Products Institute; A. B. Hamilton for United Brick & Tile Company; E. W. Hollingsworth and R. J. Boyd for Carolina Manufacturers Association; William G. Higgins for Santa Cruz Portland Cement Company; F. A. Henry for Dolese Brothers Company; Robin Hood for National Cooperative Council; Frank R. Hale for Structural Clay Tile Association; L. Jones for National Malt Products Manufacturers' Association; L. A.

Keck for M. K. Goetz Brewing Company, and Goetz Sales Company.

Wilbur LaRoe, Jr., and Frederick E. Brown for Associated Industries of New York State, Port of New York Authority, Texas Gulf Sulphur Company, and International Paper Company; W. E. Long for Sterling, Ill., Manufacturers' Association; W. H. Lovesy for Utah Oil Refining Company; W. J. M. Lahl for Radio Manufacturers' Association, Incorporated; A. G. Linneman for Associated Producers of Cereal Beverages and Burger Brothers Company; W. Gordon McKelney for Tennessee Manufacturers Association, Nashville, Tenn.; Robert J. McBride for Federal American Cement Tile Company; H. L. McReynolds for White Eagle Oil Corporation; F. B. McElroy for Whitacre-Greer Fireproofing Company; W. S. McCarthy for Intermediate Rate Association, and Salt Lake Hardware Company; T. W. Mackey for Western Shade Cloth [fol. 153] Company; J. George Mann for Northrup King & Company; L. F. Mongeon for National Retail Dry Goods Association; H. F. Masman for National Association of Waste Material Dealers, and Waste Paper Institute; Thomas B. Martin for Independent Gravel Company; William Martin for Philadelphia Quartz Company; G. O. Nickel for Bartlett Collins Company, Sapulpa, Okla.; J. K. Moore and J. T. Hiers for American Cotton Cooperative Association, and Staple Cotton Cooperative Association; E. L. Nichols for United States Fisheries Association; Cleveland A. Newton for Mississippi Valley Association.

Arthur E. Pearson for Hollingsworth & Whitney Company; J. F. Potts for Kelley Island Lime & Transport Company; Louis M. Porter for Fruit Dispatch Company; R. W. Potcet for Stanley Works; Morris Prince for North Carolina Hosiery Manufacturers Traffic Association, and North Carolina Full Fashioned Hosiery Manufacturers; F. H. Ramsdell for New Department Manufacturing Company; F. M. Russell for Steel Office Furniture Institute and Metal Furniture Traffic League; E. C. Richmond for Furniture Corporation of America, Limited, and Schlesser Brothers; Ralph Edgar Riley for Illinois Silica Sand Traffic Bureau, Illinois Brick Company, and Chicago Brick Company; W. E. Rosenbaum for cereal-beverage manufacturers and certain lime manufacturers; W. W. Sprague for National Mortar & Supply Company of Woodville Lime

Products Company; Lowe P. Siddons for Brunswick Radio Corporation; C. W. Strickland for Cone Export & Commission Company; C. T. Smith for Smith Brothers Nursery Company; R. S. Sawyer for Associated Jobbers & Manufacturers Association of Los Angeles, Calif.; W. G. Stone for Sacramento Wholesalers & Manufacturers Association; W. K. Sanderson for himself; L. D. Snow, E. Richardson, and Manghum & Manghùm for Lever Brothers; E. George Seidle for Armstrong Cork Company; Charles Sizemore for American Association of Nurserymen; N. B. Woodsum for Berst-Forster-Dixfield Company.

Herbert Thompson and Jos. C. Colquitt for Union Carbide Company; M. M. Twehig for Willard Storage Battery Company, E. W. Thompson for Interstate Cotton Oil Refining Company; Beecher W. Waltermire for Ohio Paving Brick Manufacturers Association and National Paving Brick Manufacturers Association; John L. Warren for Fruit Dispatch Company; I. H. Ware and George E. Willey for United States Fisheries Association; J. Prince Webster for Georgia Lime Rock Company; C. E. Widell for Tennessee Products Corporation; Fred M. Williams and George W. McCollum for selves and Consuming Public Citizens League of Chattanooga; Walker Wilson for Cosden Oil Company and Richardson Refining Company; E. DeL. Wood for Chattanooga Manufacturers Associa-[fol. 154] tion; R. O. Youngerman for Mason City Brick & Tile Company; R. O. Youngerman, Frank R. Hale, and H. A. Hollopeter for Structural Clay Tile Association.

Report of the Commission

By the COMMISSION:

By an application filed June 17, 1931, carriers by railroad and by water throughout the country, subject to our jurisdiction, asserting that an emergency exists, seek authority [1] to make a general increase of 15 per cent in their

[1] Specifically, the carriers seek special permission to file percentage supplements to existing tariffs increasing all freight rates and charges 15 per cent, except in certain cases where specific tariffs on substantially the same basis, complying with the ordinary rules of tariff publication, may be filed. They ask, also, that we conduct such investigation as

all-rail and rail-water interstate and international freight rates and charges.[2] By order of June 19, we directed the carriers to clarify the application in certain respects. In particular, they were asked whether they were prepared, if the authority sought were granted, to initiate increases of all existing freight rates of the measure proposed in their application, or, if not, what specific exceptions they proposed to make. This inquiry was thus prefaced:

> The Commission having in mind the fact that the carriers are equipped with traffic departments whose duty it is, among other things, to keep fully informed in regard to industrial and competitive conditions in the districts served by their lines and the ability of the traffic to bear existing or higher freight charges, and assuming that no increases in freight rates would be initiated which, in the opinion of those departments, the traffic can not reasonable bear or which for any other cause hold forth no substantial promise that revenue will thereby be increased, and being of the opinion that it is of prime importance, under present conditions, that industries and shippers should not find it necessary to participate in proceedings before the Commission with respect to freight rates, if any there be, which the carriers do not in fact intend to increase even though the authority sought be granted.

On June 24 the carriers replied that they were prepared to increase all freight rates and charges, without exception, in the measure proposed. At the hearings it was made clear that the increases sought, if approved, were to apply to (a) all rates in effect on the date of our final order herein, (b) all rates contained in prior tariffs or supplements effective subsequent to the date of such order, and (c) all rates prescribed

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may enable us to determine whether such tariffs should be permitted to become effective without suspension, and that we modify orders outstanding so that they will not prevent publication of the proposed increases.

[2] Except rates on raw milk and cream, handled principally in passenger or milk trains, and demurrage or track storage charges. The carriers also propose to adjust the increased rates so as to preserve existing port differentials on export and import traffic, and certain differentials on coal and coke within the eastern group.

by us prior to the date of such order to become effective subsequent thereto.

[fol. 155] Hearings on the application began July 15 and extended into early September. They were held at Washington, D. C., Portland, Me., Atlanta, Ga., Dallas, Tex., Kansas City, Mo., Portland, Oreg., San Francisco, Calif., Salt Lake City, Utah, and Chicago, Ill. There were taken 11,719 pages of testimony, 1,048 exhibits were received, and 656 witnesses heard. Applications for a similar general increase in intrastate rates and charges were pending or proposed before State commissions, and we accordingly invited their cooperation. Most of them accepted, selecting from their number eight representatives,[3] two from the Eastern Group, two from the Southern Group, two from the Western Group, and two from the mountain-Pacific Group. These commissioners sat with us at the hearings and during oral argument, and participated in our deliberations preceding the decision.

The Supporting Evidence

Applicants' Evidence.—The evidence of the carriers is directed for the most part to their revenue or financial needs. It deals with the carriers in the aggregate or according to the three recognized territories, eastern, southern, and western. We shall summarize this evidence briefly. In 1930, the net railway operating income of class I carriers amounted to $868,878,792, or 3.54 per cent of the value of the property, ascertained by adding to the aggregate value found by us in Increased Rates, 1920, 58 I. C. C. 220, the net cost of additions and betterments made subsequent to that date. Using as a basis the relation of revenues and expenses for the first six months of 1931 to those of 1930, the net railway operat-

[3] W. D. B. Ainey, Chairman, Public Service Commission of Pennsylvania; Herbert W. Trafton, Commissioner, Public Utilities Commission of Maine; Harvey H. Hannah, Chairman, Railroad and Public Utilities Commission of Tennessee; Hugh White, President, Public Service Commission of Alabama; Paul A. Walker, Chairman, Corporation Commission of Oklahoma; A. R. McDonald, Commissioner, Railroad Commission of Wisconsin; William J. Carr, Commissioner, Railroad Commission of California; J. M. Thompson, President, Public Utilities Commission of Idaho.

ing income for 1931, it is estimated, will amount to $553,000,000, or 2.25 per cent upon value as above ascertained. Compared with 1930, in the first six months of 1931 freight revenues decreased 18 per cent, passenger revenues 23.3 per cent, mail 5.4 per cent, express 24.2 per cent, and miscellaneous 18.8 per cent. Operating expenses decreased 17.2 per cent, and to effect this decrease it was necessary to limit maintenance. Using as a basis freight revenues for 1931, so estimated, the 15 per cent increase in rates and charges sought would, if there were no consequent falling-off in traffic, yield an additional $502,000,000 of revenue, which, allowing for income tax and other deductions, would bring net operating income to $985,000,000, or 4.01 per cent on the assumed property value.

[fol. 156] Evidence was submitted to show that, judged by recognized indices of operation, there has been a steady and large improvement in the economy and efficiency of railroad operation since 1920. No evidence was offered by the carriers bearing on the reasonableness of the wages which they pay, and we refused to receive evidence offered by others in regard to this matter, on the ground that we have no jurisdiction over wages or part in the procedure prescribed by the Federal law for their determination.

The carriers are not seeking the full fair return on value to which they assert that they are entitled by law. They are willing to share with other industries the burden of the general depression. They ask to be relieved of a part of their present burden on the grounds that public regulation prohibits them from sharing to the same extent as private industries in the profits of prosperity, that their present low earnings imperil their credit and hence the stability of an industry on which all others are dependent, and that the increase desired will restore confidence, stimulate buying, and lead the way to a return of prosperity. They further assert that on any conceivable basis of valuation they are falling so far short in their earnings as to make it unnecessary to determine in this proceeding the actual aggregate value of their properties devoted to carrier use. For similar reasons they deem it unnecessary to inquire whether the 5.75 per cent, heretofore fixed by us, is a fair return under present conditions.

The carriers offered no evidence with respect to the rates on any particular commodity or kind of traffic. Other than

general assertions in testimony by three presidents, one from each territory, that on much traffic the increased rates would produce revenue substantially in proportion to the percentage sought, they offered no evidence as to the effect which the increase would have on the movement of all or any traffic. They presented no witnesses familiar with traffic conditions, and resisted the attempts of shippers to call their traffic officers to the stand. It was admitted that it had been found necessary to reduce numerous rates voluntarily to meet competitive conditions and to refrain from taking advantage of all the opportunities to increase freight rates which our decisions have offered. It was also admitted that because of competitive and industrial conditions it would be necessary, if the 15 per cent increase were granted, thereafter to make numerous downward adjustments of rates with a view to holding traffic and avoiding shrinkage in revenue. For this reason it was conceded that a 15 per cent increase in rates would not yield a proportionate increase in revenue, but no estimate of the difference was given. It was testified that the presidents believed that a substantial increase in revenue would result, and that they had obtained [fol. 157] the advice of their traffic officers. Subsequent evidence showed, however, that so far as such advice was formally tendered, it bore only on the form which the increase should take if one were to be sought. No increase in passenger fares is sought, because of the feared effect on traffic and revenue.

Security Holders' Evidence.—The chief support to the carriers' application was given by two committees [4] repre-

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[4] One committee represented life insurance companies and mutual savings banks. Out of a total of about $4,700,000,000 par value of railroad bonds held by such institutions, this committee spoke for the holders of $3,444,801,000 bonds. The other committee represented large institutional holders of railroad securities, chiefly banks and trust companies holding such securities in a fiduciary capacity but including, also, universities, hospitals, and charitable organizations, fire insurance companies, and casualty, indemnity, and surety companies. The known representation of this committee is over $1,700,000,000 par value of railroad securities, mostly bonds, but this figure is regarded as an underestimate.

senting holders of railroad securities. Their evidence we shall also summarize briefly. It was presented to prove that railroad credit has collapsed, the present situation constituting an emergency of the gravest character; that we are under a legal duty to maintain railroad credit by all means in our power; and that an immediate increase in freight rates and charges is the only practicable method of meeting the emergency, regardless of the future steps required for a permanent solution of the problem of stabilizing railroad credit. Evidence was offered to show that there has been a serious decline in the market value of railroad bonds, and particularly of the overlying and refunding mortgage bonds which, with a few exceptions, are the only medium by which carriers can now hope to raise money for refunding or for new capital expenditures. In the case of the 59 class-I roads having operating revenues of $10,000,000 or over and having overlying bonds outstanding in the hands of the public, such bonds suffered an average decline under the high point of 1930 of 17.6 points to June 1, 1931, and of 28.5 points to August 24. The average income yield to maturity was 4.83 per cent at the 1930 high, 6.94 per cent on June 1, 1931, and 7.66 per cent on August 24. They are, in general, bonds which were, prior to the depression, bought by conservative investors at low interest rates. This decline has taken place at a time when money rates were extraordinarily easy and there was a large and increasing demand for safe bonds, and it has been greater than in the case of any comparable class of securities. Bonds which are regarded as safe investments contemporaneously increased in value.

Of a total of $7,562,500,000 railroad bonds now legal for investment by savings banks and trustees, if the New York savings bank standard be applied, the testimony indicates that about $5,877,600,000 are in grave danger of being [fol. 158] stricken from the list. To be eligible under this standard, the railroad issuing the bonds must have earned its fixed charges at least 1.5 times during five of the last six fiscal years preceding the investment, and in the fiscal year next preceding. But elimination from the list does not necessarily mean that such bonds, previously acquired, must be sold. In the case of the New York savings banks, the Superintendent of Banks may order them to be sold, and all holding such bonds in a fiduciary capacity must, in the

exercise of a wise discretion, be governed by the legal principles affecting the duty of trustees with respect to investments. Certain railroads of previous unquestioned financial standing will probably fail to earn all their interest requirements this year. Greater deficiencies have been prevented by reductions in operating expense, including deep cuts in maintenance. Along with the impairment in railroad credit has gone a tremendous shrinkage in the value of the equities represented by railroad stocks.

This impairment in railroad credit is ascribed by these committees to the inadequacy of the average rate of return since the passage of the Transportation Act, 1920; to the decline in the margin of safety for interest on railroad bonds, due chiefly to the disproportionate increase in operating expenses as compared with fixed charges; and to the decline of confidence in the future of the railroads, because of the rapidly increasing competition. Not only does this fall in credit now close normal channels of railroad financing for refunding operations and the raising of new capital, but in the opinion of these committees it threatens the permanent withdrawal of capital from the railroad industry. The shrinkage in the market prices of railroad securities imperils the beneficiaries of trust funds, and also the reserves of conservative financial institutions in a manner tending to intensify the present economic crisis. The committees regard the maintenance of railroad credit as second in importance only to the maintenance of peace and order through government, and as essential to a return of normal economic conditions, railroad service being an indispensable public facility affecting the entire economic life of the nation. They contend, finally, that the granting of a rate increase is the only practicable method of meeting the existing and immediate emergency, and that no other method has been suggested. They assert that just as, even in a depression, taxes must be increased, if that be necessary to support the credit of the government, so railroad rates must be raised if this basic industry be in peril.

Commercial Organizations' Evidence.—A few commercial organizations definitely favor the increase sought. Those who do not oppose have for the most part maintained an attitude of neutrality.

[fol. 159] The Question of Law

Before indicating the nature of the opposition, it will be well to consider the contentions of the carriers with respect to the law. Technically, the application is under section 6 of the interstate commerce act for authority to depart from our ordinary rules governing tariff publication, coupled with a request that we now reach the conclusion, after investigation, that if the contemplated tariffs are filed, they will not be suspended. Fundamentally, however, the carriers rely upon the provisions of section 15a(2) reading as follows:

(2) In the exercise of its powers to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation; Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

Section 1 (5), which antedates section 15a but was reenacted in the 1920 legislation, requires, among other things, all charges made for any service rendered in the transportation of property to be just and reasonable, and it prohibits and declares unlawful "every unjust and unreasonable charge for such service or any part thereof."

Briefly stated, it is the position of the carriers that section 15a changes our duty to prescribe just and reasonable rates by introducing in the law a new standard for our guidance. It is asserted that under the former law a carrier in a competitive group had no legal protection unless the strongest carrier in the group was in a position successfully to assert confiscation of its property. The rates being competitive, the weaker line had to meet them or go out of the business. The stronger line might not be disposed to assert in the

courts its constitutional rights. Even if it were so disposed and succeeded in the assertion, the increase it could secure in the rates would only be that which would bring its own earnings above the line of confiscation of its own property. Such a measure of relief would fall below, perhaps much below, the measure of the constitutional rights of the weaker lines. Prior to 1920, the argument is that we had dealt with revenue considerations as a factor in just and reasonable rates, but had not solved the problem of the treatment of groups of railroads in such a way as to maintain their earnings, their credit and their adequacy as component parts of a national [fol. 160] system of transportation. Section 15a was designed to remedy that failure. "In substance," according to the carriers, "the constitutional right of a single carrier to a fair return which could not as a practical matter be asserted was extended to the group as a whole and the Commission was given a mandate to render the right productive."

Because of the provisions of section 15a, it is contended that rates, otherwise reasonable, perforce become unreasonably low if the general schedule of rates, of which they are a part, produces revenues which in the aggregate fail to attain the results contemplated by the section. Quoting from the carriers' brief, "It is thus apparent that in any case involving the reasonableness of an increase or decrease in the general rate level, the revenue consideration is paramount and controlling." Quoting again, it is said "that the use of the expression 'just and reasonable rates' in section 15a connotes a different meaning from its use elsewhere and recognizes the paramount financial consideration." It is urged that the section is superimposed upon the power to prescribe just and reasonable rates in such a way that if the effect of the exercise of that power is to bring the revenues above or below the statutory level, adjustments of earnings to that level must be made by us through other changes in rates. The words "as nearly as may be" in paragraph (2), according to this view, introduce no discretionary factor, but merely cover the mathematical impossibility of attaining the prescribed standard precisely.

In support of this view the carriers rely chiefly upon Dayton-Goose Creek Ry. v. U. S., 263 U. S. 456. Among the statements in that opinion which are stressed are the following:

The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is * * * by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged. (Page 478.)

Rates which as a body enable all the railroads necessary to do the business of a rate territory or section, to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section. (Page 480.)

It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in determining whether the sum of the rates is fair. The investment is made on the faith of a profit, the profit accrues from the balance left after deducting expenses from the product of the rates, and the assumption is that the operation is economical and the expenditures are reasonably [fol. 161] necessary. If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so. One obvious way to make the sum of the rates reasonable so far as the carrier is concerned is to reduce its profit to what is fair. (Page 483.)

Among pertinent quotations from other decisions of the Supreme Court is the following from Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563, 585:

It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons

and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15a to be one of the purposes of the bill.

The carriers also stress a report of the House Committee when the Transportation Act, 1920, came out from the conference committee. In this report it was stated that the House Bill "continued the existing law authorizing the Interstate Commerce Commission to prescribe just and reasonable rates," but that the Senate amendment "added to the just and reasonable rate a requirement that the rates must be adequate to enable the carriers as a whole to earn a fair return on the aggregate value of their property." It was further stated that the "House receded from its disagreement to these provisions."

Up to a certain point we do not differ with the carriers' interpretation of the law. We agree that our duty with respect to fixing just and reasonable rates was changed by Congress in the act of 1920, through the provision of a modified standard for our guidance. We agree that there was then introduced into the law a new element of protection for the carriers in the public interest, a protection particularly of the credit essential to the preservation of an adequate national system of transportation. We believe that it is our duty under the Congressional mandate to exercise our powers in every reasonable and practicable way to the promotion of that end. We agree, as we did in 1920, that in such a general rate proceeding as this, involving primarily revenue considerations, we can not undertake to consider the justness and reasonableness of individual rates.

But there is more than this to be said, if our full duty is to be made clear. In Reduced Rates 1922, 68 I. C. C. 676, 730, we said, in considering section 15a, "Our function under the law is not that of mere computers and can not thus be atro-
[fol. 162] phied." Assuming that the paramount purpose of that section is the provision of adequate revenue for the

carriers, it is the actual revenue result of a proposed increase in rates which we must have in mind, and not the effect apparent superficially. We understand that in principle the carriers do not dispute this proposition, although they may differ as to how conclusions upon this point are to be reached. Our own view is that we are not justified in approving a rate increase if we are convinced that such increase will not operate to the revenue advantage of the carriers.

On this point, the following from Florida v. United States, 282 U. S. 194, 214-215, is pertinent:

> In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question is that of the relation of the rates to income. The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage. * * *
>
> The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service.

Nor is this all. In Smyth v. Ames, 169 U. S. 466, 547, the court said:

> What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.

This principle has repeatedly been affirmed by the Supreme Court. It is stated in Corpus Juris, Vol. 10, page 418, and we think accurately:

> The public is entitled to demand that no more shall be exacted from it than the services rendered are reasonably worth, and this right takes precedence even over the right

of the carrier to a fair return on its investment when the two rights can not stand together. In consequence, the value of the service to the public is an important factor in determining the reasonableness of the rates charged therefor.

An application of the principle is found in Covington, &c. Turnpike Co. v. Sandford, 164 U. S. 578, 597, where the court said:

It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishment of new lines of transportation should cause a diminution of the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use the property.

[fol. 163] We do not understand that Congress, even if it be assumed that it could lawfully have done so, attempted in section 15a to override or discard this basic principle of the law, or that there is anything in the decisions of the Supreme Court which indicates that such a result has been accomplished. In Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., supra, 586, the court said:

Section 15a confers no power on the Commission to deal with the intrastate rates. What is done under that section is to be done by the Commission "in the exercise of its powers to prescribe just and reasonable rates," i. e., powers derived from previous amendments to the Interstate Commerce Act, * * *.

In the Dayton-Goose Creek Case, the question at issue was the validity of the recapture clause, and the court was not called upon to define or consider all the factors which affect the determination of reasonable rates. It did say that an individual shipper, because of his interest in the maintenance of "all the railroads necessary to do the business of a rate territory," could not complain of a general level of rates higher than would have been reasonable considering the service rendered him alone. We agree with

the carriers that prior to section 15a the revenue needs which we were bound to consider were those of individual carriers, although as a practical matter we have long considered all competing lines and not merely that line which can handle the business cheapest in determining the reasonableness of rates. Receivers and Shippers Asso. v. C., N. O. & T. P. Ry. Co., 18 I. C. C. 440. Thereafter the standard was changed by Congress so that now we are bound to consider instead the revenue needs of the carriers in the aggregate or by groups, and such needs were brought into the foreground and emphasized. In every reasonable and practiable way we must recognize those needs and protect the general credit of the carriers. The direction to maintain an adequate system of transportation was re-affirmed by Congress in the Hoch-Smith Resolution in 1925, U. S. Code, T. 49, sec. 55.

But section 15a has not, in our opinion, made revenue needs the "paramount and controlling" factor in the determination of a reasonable general level of rates. Factors which theretofore were relevant and entitled to consideration, notwithstanding the revenue needs of individual carriers, are still relevant and entitled to consideration, notwithstanding the revenue needs of the carriers in the aggregate or by groups. Among those other factors are the following:

1. The value of the service to the shipper.—The relation of the general level of freight rates to the general level of commodity prices is a factor which cannot be disregarded, particularly in a time of general financial prostra- [fol. 164] tion. Stated in another way, it means consideration of what the traffic can reasonably be made to bear. As the Supreme Court recently said in Ann Arbor R. Co. v. United States, 281 U. S. 658, 669, in speaking of certain words in the Hoch-Smith Resolution:

If they mean no more than that the depressed condition of the industry is to be given such consideration as may be reasonable considering the nature and cost of the transportation service and the need for maintaining an adequate transportation service, they work no change in the existing law.

This resolution became law subsequent to the enactment of section 15 (a).

2. The volume of business carried on by the carriers and its relation to what may be deemed normal.—As we said in Reduced Rates, 1922, supra, 680:

> The operation of economic forces which have prevented, or which may hereafter prevent, carries from earning a fair return under the adjustment prevailing does not constitute a bar to determination of what a fair return should be. By the qualifying words "as nearly as may be," Congress recognized that conditions during certain periods might prevent such realization under any adjustment of rates.
>
> Section 15a, reasonably construed, contemplates the determination of a return which the carriers, collectively, or in rate groups, may attain over a period of time under rates adjusted from time to time with that object in view. The phrase "from time to time" does not mean that we should adjust and readjust rates to meet business fluctuations.

It is only necessary to have in mind the incongruous results which would follow an attempt to adjust rates so that a stable rate of return would be realized, notwithstanding general business conditions and the rise and fall of traffic in consonance therewith, to realize the unreasonableness and impracticability of any such policy. In part this is recognized by the carriers in this very application.

3. The return realized from the freight service alone, as distinguished from other forms of service rendered by the carriers.—Nor. Pac. Ry. v. North Dakota, 236 U. S. 585, and Norf. & West. Ry. v. West Virginia, 236 U. S. 605. It is not our view that these cases prevent the imposition of a burden upon one form of service to compensate for an inevitable deficiency in earnings of another form of service performed by the same carrier. Revenues in Western District, 113 I. C. C. 3, 22-23. However, the earnings of the particular service in question are entitled to consideration in the fixing of reasonable rates.

For the moment we express no opinion as to the weight to be given these particular factors in the present proceeding. That will be considered later. But that they are relevant and material factors which must be given consid- [fol. 165] eration we are persuaded. We are here speaking

of the general level of rates, as applied to all traffic, or particular forms of traffic, and not of individual rates.

The Opposing Evidence

We now come to the evidence presented by protestants. As in the case of the supporting evidence, it will here be very briefly summarized. Protestants are numerous and represent not only commercial organizations but many of the most important industries of the country. Agriculture in all its branches, including livestock and dairy products, is represented, as well as coal (both bituminous and anthracite), copper, lead, zinc, iron and steel, sand, gravel and crushed stone, cement, sulphur, clay products, logs, lumber, petroleum and its products, newsprint and other paper, packinghouse products, fisheries, naval stores, sugar, furniture, textiles, canned goods, fertilizers, chemicals, glassware, and other industries. Collectively, protestants represent the great bulk of the carriers' freight traffic. In several instances States are represented officially in protest, in the West, East, and South. These protestants in general recognize the serious revenue needs of the carriers, and for the most part they are in no wise unfriendly to the railroads. The protests are not animated by the ordinary and natural antagonism to any rate increase, but very largely by a sincere conviction that harm rather than good would result therefrom, both to the country generally and to the carriers.

This opposing evidence, broadly speaking, follows two distinct although related lines. A mass of evidence was introduced to show that the carriers are not alone in their financial distress but have the company of practically all industries, many of which are in worse condition. The causes of suffering are not only the great shrinkage in volume of business done, but a violent fall in the prices received for products, a fall which has not been experienced by the carriers in the prices which they receive for their services. This fall in the price level, in the case of agriculture, has been of extraordinary severity, so that important branches of that industry are in a state of unprecedented collapse and prostration. The situation is similar and almost as acute in certain other industries, and depression in greater or less degree extends to all.

Because of this situation, the burden of transportation expense in the distribution of products has vastly increased in relative importance and weight, with the result that the industries find it necessary to minimize and curtail this expense in every feasible way, regardless of sympathy for the railroads and reluctance to harm them financially. Following the line thus indicated, voluminous and detailed evidence was presented to show the unusual opportunities for [fol. 166] reducing transportation expenses which now exist, the extent to which industries have availed themselves of these opportunities, and the extent to which this tendency would be accelerated if freight rates should be increased 15 per cent. We shall discuss this situation in more detail at another point in this report. It will suffice here to say that it was by no means confined to mere opinion evidence, for in many instances opinions were fortified by the presentation of concrete and specific facts and pertinent statistics.

In addition to evidence along these lines, testimony was given by economists to show that an increase in freight rates under present conditions would be economically unsound, and that it would be much more likely to harm than to help the general situation. It was also shown that in certain former periods of acute financial depression the railroads, prior to effective Federal regulation of their rates, did not increase rates. On the contrary the tendency was downward. Statistics were presented covering railroad operations in the past, including financial results, to some of which we shall advert hereinafter. The fact was emphasized that it has been decline in net passenger earnings rather than in net freight earnings which has been the predominant factor in bringing the railroads to their present position. Evidence was also offered to show that the credit situation of the carriers may not in all respects be as desperate as is indicated by the testimony of the committees representing security owners.

Discussion and Conclusions on 15 per Cent Increase

In this discussion we shall deal first with the railroad credit situation, dividing it into two periods, one from 1920 to 1929, inclusive, and the other from 1930 to the present time.

The first of these periods, considering the carriers in the aggregate, was characterized in general by continual

improvement in carrier credit. It was a period of rapid expansion in railroad plant and facilities. Investment in road and equipment increased by about $5,500,000,000. Funded debt, including equipment obligations, totalling $6,918,180,691 par value was issued, some of course in connection with reorganizations and a great part to refund other securities. Stock totalling $1,887,881,601, par value or its equivalent, was issued, including stock dividends, which did not, however, account for any large fraction of the total, and stock issued in connection with reorganizations. Corporate surplus increased from $3,142,416,871 to $5,529,010,053, a total of $2,386,593,182, or about 76 per cent. The amount of stock yielding dividends increased from $5,075,039,642 to $7,506,264,973; the average rate on dividend-yielding stock, from 6.52 to 7.47 per cent; and the [fol. 167] average dividend on all stock, from 3.74 to 5.70 per cent.

It is true that at no time did the aggregate net railway operating income equal 5.75 per cent on our best estimate of the fair value of aggregate carrier property; and much has been made of this fact by the carriers and security holders. But without wholly disparaging the importance of this fact, it is also true that after 1922, when we found 5.75 per cent to be a fair average return, the general trend of interest rates was downward, and that at no time following the 10 per cent reduction in rates in that year did the carriers seek a horizontal increase in rates, except in the western district. There a 5 per cent increase was sought and denied, but with the suggestion to the carriers that they should analyze their traffic and initiate increases on particular commodities in lieu of a horizontal increase on all traffic. We are also persuaded that the recapture provisions of section 15a had a tendency to depress aggregate net earnings by unduly stimulating the expenditures of the more prosperous carriers.

The point has been made that the carriers during the period of prosperity were prevented by public regulation from enjoying the large profits which accrued to private unregulated industries. Aside from the fact that in the period 1920 to 1929, the carriers increased their total corporate surplus by over two billions of dollars and at the same time were able to increase dividend payments materially, the evidence indicates that a misleading impression

is created by the fact that railroad earnings are stated in the aggregate, including all railroads both good and bad, those which were improvidently constructed with inadequate public need and those which constitute the essential arteries of commerce. In the case of private industries, no similar information is broadcast and attention is apt to be concentrated on the outstanding companies which are making the largest earnings without reference to a greater number which have failed. Research into the aggregate earnings of typical private industries the results of which were presented of record, indicate that the average earnings of the railroad industry have been better than those of some of these private industries and not much less favorable than those of others.

Reference has also been made to the dwindling ton-mile revenue of the railroads, and this is ascribed to public regulation. From 1890, when the figure was 0.941 cents per ton-mile, the tendency was steadily downward until 1899, when 0.724 was reached. Then it was slightly upward to 1904, when the figure was 0.780. Again the tendency turned downward until a low point of 0.719 cents was reached in 1916. Thereafter, the figure rose sharply during the War period and the immediately ensuing years, with our ap- [fol. 168] proval, to meet the greatly increased expense of operation, attaining a maximum of 1.294 cents in 1921. In 1922, the 10 per cent reduction occurred, but its full effect was not felt until 1923, when the figure became 1.132 cents. Thereafter it fell slowly, reaching 1.088 cents in 1929, or a drop of a little less than 4 per cent since 1923. However, in the same period freight operating expense per revenue ton-mile fell from 0.869 to 0.729 cents, or a drop of about 16.1 per cent. Net railway operating income from freight per net ton-mile increased from 1.918 mills in 1923 to 2.765 mills in 1929, a gain of a little more than 44 per cent, whereas net railway operating income from passengers per passenger-train car-mile decreased from 4.697 cents in 1923 to a deficit of 0.586 cents in 1929. It is plain that it has been the passenger rather than the freight business which has been a drain on net railway earnings.

Revenue per ton-mile is not a precise index of the general freight rate level, because of the varying length of average haul and composition of traffic. Assuming it to be nearly correct, it does not follow that the drop in this figure

since 1923 is due to public regulation, although this may in part be the case. We have reduced various rates and increased others. However, it is well known that the railroads have themselves voluntarily reduced many rates for competitive and commercial reasons. The nonferrous metals are outstanding examples, the rates on which the carriers have reduced for one cause or another to such an extent that, in general, the increase which we granted in 1920 has been wholly eliminated together with a substantial part of the increase made by the Director General of Railroads during the period of Federal control. Other illustrations in the case of transcontinental traffic, lumber, petroleum and its products, cotton, and numerous other commodities are familiar.

Traffic and earnings fell sharply in 1930, but without immediate substantial effect on railroad credit. The market for railroad bonds continued good. In that year, omitting issues of less than $100,000, bonds with a par value of $675,073,000 were marketed at an average yield to the public of 4.77 per cent, and $100,328,000 of equipment obligations at an average yield of 4.62 per cent. These were the lowest average yields from railroad securities sold since 1920, with the exception of 1928 in the case of bonds and 1927 and 1928 in the case of equipment obligations. In the first six months of 1931 bonds with a par value of $319,209,000 were marketed and $38,209,000 of equipment obligations. Counsel for the savings banks and insurance companies stated in argument that credit was relatively good in the first three months of this year.

The abrupt decline in railroad credit, therefore, is a very recent event, but that there has been such a decline, more [fol. 169] particularly in the case of overlying and refunding bonds, has been clearly shown. Even if the showing made by the committees representing the security holders be discounted somewhat, the situation is still ominous. That it reflects a present loss of confidence in and distrust of the railroad securities available for marketing purposes, as a reliable and stable investment, can not be gainsaid, and if this distrust is prolonged for any considerable period of time the results are likely to be very serious, both in their immediate effect on the railroads themselves and in their indirect effect upon the financial situation generally.

We are not unmindful of the needs of the carriers as to proper maintenance. Operating expenses in 1930 declined from the average of the preceding years by approximately $600,000,000, or 13.4 per cent. There was a further decline in the first 6 months of 1931, as compared with the similar period of 1930, amounting to $357,000,000, or 17.2 per cent, making an aggregate decline of 28.3 per cent under the average of the years 1924-1929, inclusive. To effect these decreases in operating expenses it was necessary to limit maintenance. The aggregate expenditure for maintenance of equipment, way and structures in 1930 was $347,000,000, or 16.7 per cent, below the average of the six-year period 1924-1929, inclusive. The combined maintenance of equipment, way and structures in the first six months of 1931 was $192,000,000, or 20.8 per cent, lower than that in the similar period in 1930. The maintenance expenditures in the years 1924-1929 to the extent of 34 per cent, which on the first half of 1931 were, therefore, below the average of annual basis would be approximately $705,000,000.

The decline in credit has been due primarily to the shrinkage in railroad earnings caused by loss of traffic, a falling off, roughly speaking, from about 1,000,000 carloadings per week to about 700,000, to say nothing of the equally serious loss in passenger traffic. That this decline is due chiefly and predominantly to the business depression we have no doubt. There are few now living and active who have had experience with a depression at all like the present one. It has been forgotten that in such depressions the railroads always suffer very severely. The industries which suffer most severely are those which produce largely capital equipment, such as the iron and steel industry; next comes the railroads; then the industries which produce primarily consumers' goods; and the public utilities suffer least of all. On the other hand the reaction, as prosperity returns, is in reverse order. But in this instance the distrust in railroad securities inspired by the effects of depression has been much accentuated by the rather sudden awakening to the fact that the railroads are now faced by serious competition from other, largely new, and de- [fol. 170] veloping means of transportation. And it has been further intensified by the widespread publicity which the railroads and the holders of their securities have deemed necessary in the pursuit of restrictive and regula-

tory legislation for the other forms of transportation and the proposed rate increase. The final result is that the situation now has in it the element of panic.

This overshadowing pessimism, like the optimism of 1928, is undue, and will be corrected in the natural course of events. But in the meantime it is a fact which must be reckoned with. The question is whether a 15 per cent increase in freight rates is an effective, reasonable, and lawful way to meet the situation.

It is not inappropriate to say that we approach this question with a background of experience with railroad rates, and the conditions under which they are made and can be maintained. We deal with hundreds of rate complaints every year, and in recent years have in addition carried on most extensive investigations of class rates and the rate adjustments on particular commodities. Evidence as to commercial and industrial conditions has been prominent in all of these investigations. We have also made extensive inquiries into motor transportation and are informed in regard to transportation by waterways and pipe lines, and we know the extent to which the railroads have reduced rates to meet such competition.

The carriers draw a parallel between the present situation and that which existed in 1920 when a general increase in rates was authorized. Conditions then prevailing were radically different from those which exist today. In 1920 business was prosperous and commodity prices were relatively higher than railroad rates. Taking 1916 as a base, the year when revenue per ton-mile reached its lowest point, but a year of marked railroad prosperity, the statistics of the Bureau of Labor show that the wholesale prices of all commodities had risen 62.1 per cent in 1919 and 80.6 per cent in 1920. Prices of farm products were 86.7 per cent higher in 1919 and 78.6 per cent higher in 1920. On the other hand, in 1919, the year preceding the 1920 increase in railroad rates, revenue per ton-mile was only 37.3 per cent higher than in 1916. Contrasting this showing with 1930, in that year commodity prices generally were only 0.9 per cent higher than in 1916 and farm products 4.6 per cent higher, whereas revenue per ton-mile was 49.8 per cent higher than in 1916. Continuing the downward movement, commodity prices generally in June, 1931, were 18.1 per cent lower than in 1916 and the prices of farm products 29 per cent lower,

whereas railroad rates remained practically stationary at the 1930 level.

In 1920 the railroads faced an emergency, but it was a very different emergency from that which exists to-day. [fol. 171] They had passed through the stress and strain of the War period and ensuing labor strikes, with the result that their properties were in poor physical condition and operation was demoralized. Shippers were crying for good service and quite willing to pay the price of higher rates. There was no contention that an increase would curtail traffic. In addition the railroads were in unprecedented need of new capital. Interest rates were very high, and many of the soundest railroad companies were borrowing from the Government at 6 per cent to meet pressing needs for cash on our certificate that funds could not be obtained from other sources. By way of contrast, service is now excellent and also the physical condition of the properties, although the present curtailment of maintenance may, if continued, change this latter situation. Instead of inadequate equipment and facilities, the railroads now have a superabundance of both, many cars and locomotives being in storage in good physical condition. Nor will refunding needs be great in the immediate future. The maturities during the next 4 years are as follows:

Year	Bonds	Equipment obligations
1932	$ 70,299,513	$110,782,506
1933	187,697,740	107,484,752
1934	265,945,749	104,658,536
1935	105,585,066	101,714,545

While the credit of the railroads is at a low ebb, it is also true that for the present and some time in the future the needs for new capital are not likely to be of commanding importance.

In some respects the situation in 1922, when rates were reduced 10 per cent, is more nearly parallel with that now existing. The country was then in a state of business depression and traffic had fallen off. Commodity prices had dropped, so that generally they were only 13.1 per cent higher than in 1916, and the prices of farm products were only 11.1 per cent higher. In 1921, on the other hand, revenue per ton-mile was nearly 80 per cent higher than in

1916. The following extracts from our opinion in Reduced Rates, 1922, supra, may be considered in the light of the fact that if an increase of 15 per cent should now be made effective, railroad rates on most commodities would be somewhat higher, even, than they were in 1921:

The carriers contend that the increased rates were not even an important contributing factor in the lessening of traffic in 1921, and that reduction in rates will not restore normal traffic. They do not, however, advocate rate increases as a means to increase net revenue. They admit that rates are too high and must come down, but they insist that rates can not be further reduced until the costs of transportation are further reduced (page 704).

[fol. 172] It is generally recognized that existing high rates are a burden upon commerce, and many shippers insist that they are forcing movement to other forms of transportation, tend to restrict traffic, and in some instances to prevent particular movements (page 705).

It is our duty to initiate such rates as will enable the carriers to earn as nearly as may be a fair return, qualified as provided in the act. In 1920 we authorized large increases in freight rates and passenger fares designed to produce the necessary revenues under the conditions then prevailing. There was then little doubt of the ability of industry to bear the increased charges. The situation has since changed. The country has been passing through a period of abundant supply and slack demand, in which prices at the source have fallen off sharply. High rates do not necessarily mean high revenues, for, if the public can not or will not ship in normal volume, less revenue may result than from lower rates (page 732).

Shippers almost unanimously contend, and many representatives of the carriers agree, that "freight rates are too high and must come down." This indicates that transportation charges have mounted to a point where they are impeding the free flow of commerce and thus tending to defeat the purpose for which they were established, that of producing revenues which would enable the carriers "to provide the people of the United States with adequate transportation" (pages 732-33).

Manifestly the depression of 1921 resulted primarily from causes other than transportation charges. But it does not

follow that under present conditions existing high rates do not tend to retard the return to a more normal flow of commerce. Deflation has taken place to a greater or less extent in wages and origin prices of commodities in nearly all branches of industry but most transportation charges are still near the peak (page 733).

We are of opinion that general reduction in the rate level, as substantial as the condition of the carriers will permit, will tend not only to lessen the transportation burden but also to equalize and stabilize the conditions under which commerce and industry are carried on, with consequent fuller assurance to the carriers of realizing the fair return contemplated by the law (page 734).

As above indicated, commodity prices generally, and particularly the prices of farm products, are very materially below the pre-war level and there is no upward tendency, whereas railroad freight rates are much above a pre-war level and the proposed 15 per cent increase would place them, broadly speaking, at a pinnacle in railroad history. It follows irresistibly that freight rates, even now, constitute a greater relative burden upon industry than ever before, and at a time when industry has gravely impaired stamina to sustain the burden. There is diligent search for means of saving every cent possible in expense of distribution.

That there are important opportunities for such saving which already have been utilized in substantial degree the record amply shows. Waterways competition is not a new thing with the railroads, but it was greatly stimulated by the opening of the Panama Canal. The steamship lines which operate through that canal, although not subject to any effective public regulation, are not increasing their rates but on the contrary have been reducing them as a result of [fol. 173] intense competition. This waterway competition is now a controlling factor on most transcontinental traffic, not only between the coasts but also reaching far inland. Pacific coast lumber, for instance, moves extensively by rail as far as the Middle West from eastern ports which it reaches by boat through the Panama canal. As yet the boats have not been a controlling factor in the fruit and vegetable traffic, but certain of them, anticipating some increase in rail rates, are proposing to shippers that they will install refrigera-

tion system if traffic is offered. This would be a menace to rail traffic if rates are increased. Besides the Panama Canal traffic, there is important waterway competition along the Atlantic coast and Gulf, on the Great Lakes, on the Mississippi and Ohio rivers, and on the Hudson River and New York barge canal. Very important movements on these waterways are of petroleum and its products, coal, newsprint, sulphur, and grain. Import traffic brought by water from foreign countries to our ports often menaces domestic movements, as in the case of wood pulp, petroleum, nonferrous metals, cement, coal, sugar, and iron ore.

Movement by truck is a new form of competition which has been developing with great rapidity. It has been principally effective on less-than-carload traffic, and relatively short hauls of such commodities as livestock, cotton, cement, sand and gravel, gasoline, fruits and vegetables, and general merchandise; but it is continually extending to more and more traffic, and for longer distances, as trucks and trailers are enlarged and highways improved. At present it is aided by prevailing low prices for gasoline and rubber and the oversupply of labor. In addition to rates, advantages which it offers to the shipper are in rapid and flexible service, store-door receipt and delivery, the transportation at carload rates of much smaller lots than are possible by railroad, and elimination of costly railroad packing requirements. The carriers introduced evidence to show that it would be feasible for the trucks to divert only a comparatively small amount of additional tonnage, even if rates were increased. But without exaggerating the menace of this form of competition, we are convinced that the carriers have underrated it, and that its possibilities are materially greater than they are prepared to concede.

For a long time transportation of crude oil by pipe line has exerted a controlling force on many railroad rates on both crude oil and gasoline. To this competition has now been added pipe lines for the extensive transportation of gasoline and natural gas. This form of competition has progressed to an astonishing extent, and it seriously affects, not only rail movement of petroleum and its products and the rates thereon, but also rail movement and rates on coal, [fol. 174] both bituminous and anthracite. In addition, so

far as coal is concerned, movement by rail has been substantially curtailed by the construction of central power plants, both water power and steam. While the latter use coal, they consume it with maximum economy and often obtain it from short-haul sources, distributing their own electric power widespread by transmission lines.

Nor are these competitive means of transportation by any means the only factors tending to lessen traffic which must be considered in connection with a relatively high level of freight rates. The evidence before us amply shows that the tendency of such a level is to localize industry and also impel the use of substitute products. It is the long-haul producer demanding the maximum of transportation service who suffers most severely from high rates. The advantage of the short-haul producer is greatly accentuated, and in consequence a tendency rapidly develops to relocate plants or establish branch plants and warehouses. And these new plants or subsidiary means of distribution are inevitably located, not only with a view to shortening the haul, but also with an eye to competitive waterway and truck opportunities. That such a tendency in industry is rapidly developing the evidence before us plainly indicates. And there is a similar tendency to use, where available, substitute products which require less transportation in their distribution. This is particularly true of lumber and coal, but it affects other industries as well.

However sympathetic one may be with the plight of the railroads and their need for additional revenue, such sympathy cannot with benefit to any one be carried to the point of a refusal to recognize and face facts. The facts set forth above show beyond question that there are elements of plain peril to the railroads in such an increase in freight rates as they propose at the present time. The chief dangers are (1) that at a time when transportation costs are of vital consequence to every industry it will simulate new competitive forces already rapidly developing, (2) that it will alienate or impair the friendly feeling toward the railroads on the part of the people of the country which is essential to adequate legislation for their protection and the proper regulation of all forms of transportation in the public interest, and (3) that it will disturb business conditions and an already shell-shocked industry, and accelerate the tendency toward a localization of production. It should be borne

in mind that traffic once lost to a competitive agency is far more difficult to regain than it is to hold before it is lost. And it should also be noted that disturbance to industry would be caused, not only by the immediate increase in charges, but also by the slow process of inevitable readjustment to a lower level of rates which would be necessary in [fol. 175] many instances and which the railroad executives themselves concede that they anticipate.

We have often referred to the fact that we are not managers of the railroads and have taken the position that we ought not to interfere with those who are entrusted with management on matters which are not controlled by law but must be determined in the last analysis by wise administrative policy and judgment. That is still our view. But here reliance upon the judgment of the executives as to the revenue effect of an increase in rates is much weakened by their failure to adduce any substantial reasons for their judgment and the definite withholding of the best available information on this point in their possession, namely, the information of their traffic departments. The excuse that this would have prolonged the hearings unduly is not, in our judgment, an adequate answer. There are competent traffic officers in all the districts who represent the carriers collectively and could have been used as a means of concentrating and assembling this information. Not only did the carriers fail to present such witnesses, but in several instances they refused to produce traffic officers whom protestants wished to call to the stand for the purpose of proving their case in opposition. In addition we have the evidence gained by experience with the numerous voluntary reductions which have been made, often below maximum reasonable rates fixed by us.

On the other hand we have a mass of definite and concrete evidence from the shippers on this point of revenue effect which stands in the record uncontradicted by anything other than general assertions. Five of our members heard this evidence, although none heard it all, and they had the opportunity of appraising the character and sincerity of the witnesses. In our opinion this evidence is entitled to great weight.

We also have a mass of definite and concrete evidence from shippers in regard to the general industrial collapse and the condition of individual industries. This evidence

also stands uncontradicted and, as has already been indicated, it shows beyond dispute that the situation of the railroads with respect to earnings is parallel throughout the industrial world, and that many particular industries are in much worse plight. This is especially true of agriculture, and preeminently true of the grain farmer. The present prostration of a large part of agriculture has seldom if ever been equalled in the history of the country.

Upon the evidence, therefore, it is our conclusion that a 15 per cent increase in all freight rates and charges would increase revenues, if at all, only temporarily and that its ultimate effect, not very long postponed, would be to harm [fol. 176] rather than help the railroads. It is similarly our conclusion that such an increase would raise the rates upon many kinds of traffic above a just and reasonable level. This latter conclusion applies particularly to the products of agriculture, including livestock. We are advised that the committee representing the co-operating State commissions has reached the same conclusions.

It does not follow, however, from the conclusions above set forth that no increase in rates should be made at this time. As a result of investigations extending over many months we have prescribed, effective December 3, 1931, maximum reasonable rates on class traffic in official and western trunk-line territories and between those territories whose net effect we believe will be a substantial increase in revenue, unless diversions to trucks attain unanticipated proportions. We have also prescribed maximum reasonable rates throughout the country on furniture, effective February 25, 1932, which may produce increased revenue, although the danger of diversion to trucks is greater in the case of furniture than in the case of class traffic taken as a whole. We have also prescribed maximum reasonable rates on livestock in the western district, effective January 25, 1932, which should increase the revenue from this traffic in western trunk-line territory, where the revenues of the railroads have been particularly low. A similar revision, in general upward and effective December 3, 1931, has been prescribed in the case of petroleum and petroleum products.

In addition to these pending revisions and others which are in progress on our docket, we believe that the traffic departments of the railroads should address themselves to

the task of making such changes in the rates on particular kinds of traffic as will, in their judgment after careful analysis of all attendant circumstances, produce additional revenue and which can be supported as reasonable under existing conditions. This does not necessarily mean increases in rates. It is quite likely that there are now many rates which will produce more revenue if they are reduced, and we include in this category rates which we ourselves have prescribed as maxima. Some such rates have already been reduced, but we fear that there is at times a reluctance on the part of traffic officers, because of possible contingent effects, to cut below these rates even when they believe that the result would be to railroad advantage. But in addition to reductions it is not at all unlikely that there are a considerable number of rates which can reasonably be advanced substantially, even under present conditions.

If tariffs are filed, in accordance with this suggestion, proposing changes in rates upon particular movements or kinds of traffic, we shall be guided, in determining whether [fol. 177] they shall be suspended, not only by the statements filed in support and protest, but also, in part, by our own general knowledge and the record in this proceeding as bearing on the particular kind of traffic in question. It should be noted that the protests which we are here considering do not go to every form of traffic. And to the extent that suspension proceedings are initiated, we shall expedite their disposition.

But at best a process of rate readjustment of the kind above described is slow, and in our judgment it will not fully meet the needs of the present situation. The further step which we are now about to propose is offered for the consideration of the railroad executives in the immediate emergency, and only as a temporary measure of relief. It is motived by the thought that the distrust of railroad securities is rapidly gaining such elements of panic that a slight charge on the traffic of the industries of the country best able to stand it may justifiably be imposed, through freight rates, for the purpose of increasing confidence and averting developments which might further disturb an already tremendously shaken financial situation, and to avoid impairment of an adequate system of transportation.

This plan is outlined in the appendix. It is designed to avoid imposing burdens on industry which can not reason-

ably be borne under present conditions, to limit the danger of diversion of traffic to other forms of transportation, and to disturb business conditions as little as possible by preserving, very generally, existing rate relations. Therefore certain commodities have been excluded from any increases and the increase has been tempered on others. The basis has been made as definite as possible in order to minimize disputes, and as simple as possible in order that the increased rates may be made effective speedily. The increase is in cents per 100 pounds or amounts per car, subject to a fixed percentage maximum limit. Except for very short hauls affected by this maximum, it is in uniform amounts, so far as particular kinds of traffic are concerned. The abnormal conditions now existing distinguish the situation from that before us Increased Rates, 1920, supra, wherein we discussed the respective merits of percentage and flat increases. We propose to limit the increase to a period ending March 31, 1933. Its continuation after that time will depend upon conditions then existing.

As has been shown, the carriers and holders of their securities stress the credit situation. As a whole, earnings are inadequate, yet the earnings of certain of the carriers are ample to support their credit. The securities of even such carriers suffer from the distress of others not so fortunate. The increases which we propose would, without further provision for the allocation of the resulting revenue, to a certain degree help the carriers now in need, but [fol. 178] would go, in part, to carriers now securing revenues adequate to sustain their credit, and as to which no emergency exists. They would not afford aid in maintaining an adequate transportation system for the country in proportion to the burden imposed on the public.

The advisability of pooling the earnings resulting from any increase granted has been discussed of record. Assuming that the credit of the railways is the prime reason for this application, the suggestion has merit. The standing of railroad obligations and the consequent credit of the carriers, even those enjoying adequate earnings, will be improved if a plan can be devised which will give reasonable assurance that fixed interest obligations, not now in default, can be protected generally from default.

The applicants apparently recognize that at this time it is futile to increase rates with the object of reaching 5.75 per

cent on the value of their properties as a whole. The practical limitation of what the traffic will be bear and continue to move by rail must be given consideration. Clearly any practicable increase, unaccompanied by a pooling provision, might not prevent threatened default in the fixed interest obligations of some of the carriers. On the other hand, a smaller increase in the aggregate revenue, marshalled for the benefit of the carriers in need, will tend to stabilize the industry. We shall provide for such marshalling.

We do not find that we are justified on this record to attempt, by a rate increase, to protect the margin of one and one-half times fixed charges set by the New York law. To provide so far as practicable that actual interest charges be met is justified.

The plan outlined in the appendix we estimate will produce between one hundred million and one hundred twenty-five million dollars increased revenue on the basis of present traffic if applied both State and interstate. This should cover deficiencies in interest on fixed interest obligations with a substantial balance left over. The above estimate does not include increases in revenue which should accrue to the carriers during the coming year from the outstanding orders of the commission which have been mentioned above.

Many difficulties will have to be met in working out the details of a plan for the marshalling of the fund derived from the increase authorized, and for the distribution of that fund in the first instance among the carriers who fail to earn their interest charges, in proportion to their deficiencies. We are convinced that these difficulties can be met. A plan to that end should be worked out by the carriers and submitted for our approval. In such a plan appropriate provision will have to be made to take care of variations in maintenance, depreciation and other operating charges. Perhaps the depreciation and maintenance charges of the year immediately preceding the time of computation should [fol. 179] be prescribed as the maxima of those accounts in determining deficiencies in earnings. Appropriate provisions should be made as to the accounts of carriers reporting separately but operated as part of a system. Other similar adjustments may be necessary.

Some carriers have obligations that are already in default, some are now in receivership, and some derive less than 50 per cent of their revenue from freight transportation. Such carriers should neither contribute to, nor receive from, the fund created, and they should be allowed to retain the full amount of the revenue accruing to them from the increased rates. The applicants should set up the machinery for operating and should operate the plan. At the end of six months or other appropriate interval, any balance remaining in the fund so created should be distributed to the carriers in the proportions in which earnings accruing on their properties have contributed to it.

The increase provided for in the appendix will be conditional upon the submission by the carriers, on or before December 1, 1931, for our approval under the interstate commerce act, of such a plan as is above described from the division among them of the gross proceeds derived from the increase. The plan submitted should provide that the revenues received from such increases should be earmarked and should be used for the purposes and in the manner above provided, and not otherwise. The increases herein proposed should be accepted as an entirety. If, for competitive or other reasons, the carriers decrease any of the rates so increased, the amount of the decrease should be taken from the basic rates rather than from the earmarked increases provided herein. Upon such submission and approval, we shall grant the necessary authority under section 6 for filing the blanket supplements, and those will be permitted to take effect without suspension, subject to the proviso that we shall reserve discretion to require minor changes in the details thereof; and that the resulting rates will in all respects be subject to investigation and determination as to the lawfulness of particular rates or schedules of rates, as provided by the act.

The Railroad Future

It is not enough in this report to deal merely with the 15 per cent increase proposed and our substitute form of temporary relief. Something should be said of the railroad future and what can be done in a more enduring way to protect and stabilize it. The railroads now furnish the backbone and most of the other vital bones of the transportation sys-

tem of the country, and we believe this will be the situation for a long time to come. We are not impressed with the [fol. 180] thought that they are doomed, in anything like the near future, to go the way of the stage coach and canal.

The most effective remedy for the immediate ills of the railroads is the economic recovery of the country. The present low earnings are not the result of low rates but reflect general industrial conditions. The earnings will continue to reflect those conditions as business improves, just as they have in the past. While the tide may be slow in turning, there is no more reason for thinking that business will not improve than there was in 1928 for thinking that depressions were a thing of the past and that we were in an era of permanent prosperity. Public emotion swings from one extreme to the other, and there is nothing more volatile than the emotion of the investing public. When railroad earnings take a sharp turn upward, as in due time they will, railroad credit will also rise.

But there are many things which can be done to improve the situation, some of them by Congress, some by State legislatures, some by this commission and the State commissions, and some by the railroads themselves.

An important step is the repeal of section 15a and the substitution of a better section designed to accomplish the same general purpose. We recommended such legislation last year in a special report to Congress and shall renew the recommendation in our annual report this year. The present recapture provisions impose in their enforcement a vast expenditure of time and money upon both the government and the railroads, they provoke litigation over complicated questions of valuation and accounting, they encourage extravagant expenditures by the more prosperous companies when times are good, they hang like a cloud over the credit of many companies when times are bad, and under the present law there is no effective way of using the funds to public advantage if they are recaptured. The problem presented by the varying earnings of different railroads can better be met in other ways, such as consolidations, pooling arrangements, and the adjustment of divisions.

Nor do we believe that the present provisions of paragraph (2) are desirable in all respects. They cherish elusive hopes that by mere changes in rates railroad earnings can

be made stable regardless of economic conditions. In our special report to Congress we suggested a substitute for this paragraph which we believe will better serve the end desired. It is short and there is no better way of explaining its provisions than by inserting it here:

As a guide in adjusting the general level of rates, in the exercise of its power to prescribe just and reasonable rates, the commission shall from time to time determine and make public what percentage of the aggregate of the contemporaneous rate bases of the operating carriers constitutes a fair return thereon. In making such determination it shall give due consideration, among other things, (1) to the pres- [fol. 181] ent and reasonably prospective transportation needs of the country, (2) to the necessity, in the public interest, that the carriers shall be able to establish and maintain a credit sufficient to attract the capital required to meet these transportation needs, and (3) to the necessity, in the public interest, that the carriers shall furnish transportation service to shippers and travelers at the lowest rates consistent with adequate service and the meeting of the transportation needs. Having determined such fair return, the commission shall endeavor to adjust the general level of rates so that operating carriers as a whole (or as a whole in each of such rate groups or territories as the commission may from time to time designate) will under normal conditions and under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate net railway operating income equal, as nearly as may be, to such fair return. The fact that such aggregate net railway operating income falls below such amount in times of economic depression or rises above it in times of economic prosperity shall not necessarily be regarded as a reason for raising or reducing rates, as the case may be; but the duty of the commission in the exercise of sound discretion shall be to maintain so far as possible a general level of rates which over a period of years will produce earnings consistent with the principles, above set forth, to be observed in the determination of the fair return; and the commission shall initiate, modify, establish, or adjust rates to the extent that it may find necessary in the full performance of the foregoing duty.

We believe that this substitute emphasizes the public need for maintaining railroad credit quite as strongly as does the present paragraph. It will be noted, also, that it contains recognition of the principle that inasmuch as railroad earnings must inevitably fall below normal in times of depression they may properly be permitted to rise above normal in times of prosperity. Such recognition might well be supplemented by a provision that some portion of surplus accumulations shall be held in liquid form. Present experience shows that no matter how large such accumulations may be (and they have been large in the case of the railroads during the past decade), they may be of comparatively little use in meeting immediate deficiencies in earnings, if they are invested in railroad property, as they normally are. So invested, they can be converted into cash to replenish the treasury only by the issue of securities, and these cannot be issued when credit is impaired.

Congress and the State legislatures should also, we believe, direct their attention to the proper regulation in the public interest of all competitive forms of transportation. In this we include such restrictions on the size and weight of trucks and their lading as public safety may dictate, such taxation of trucks and busses as may be necessary to impose upon them a fair share of the burden of the public highways which they use, such supervision of truck and bus common carrier lines as may be necessary to avoid destructive and wasteful competition, and such regulation of their rates and [fol. 182] service as the public interest may require. We are here stating only very broad principles, the practical application of which must be governed by the definite ascertainment of facts many of which are now in controversy. Our purpose for the moment is only to direct attention to matters which are in urgent need of legislative consideration. The facts in regard to motor competition we helped to develop some years ago in a report made after special investigation. We hope in the near future to supplement these facts and bring them up to date, together with specific recommendations for legislation, in a report on the coordination of rail and motor service which is now in progress.

What we have said as to the trucks and busses applies also to the waterways. It is strongly urged by the rail carriers that the water carriers are not bearing their fair

share of the burden of the waterways, constructed or improved at public expense, on which they operate. Here again the facts are controversial and must be ascertained. But the contention of the rail lines presents a matter for unbiased investigation, which may be in need of correction if fair competitive conditions are to prevail. The same may be said of the public regulation of the port-to-port rates of common carriers by water, which are now subject to no effective regulation. The lack of stability and apparent demoralization from time to time of these rates, particularly those of the lines operating through the Panama canal, at least suggest that some greater measure of public control may be in the interest of the water carriers themselves as well as in the general interest. History shows that this was true of railroad rates, as most of the railroads now concede. These matters need present legislative consideration.

The so-called car-forwarding companies present a situation in the transportation field which calls for public regulation, as we pointed out and recommended in our last annual report. Here there seems no difference of opinion on the point. It is not unlikely that the service performed by these companies can, with profit to the railroads and advantage to the country, be made a definite part of railroad service.

The railroads, as cities expand and public highways multiply in number and use, have been and are being called upon to invest great amounts of capital in alterations of their properties which are often, from a strictly railroad point of view, very largely nonproductive. The burden of these expenditures must be borne by the public in one way or another, but the question arises whether this burden is being apportioned fairly. To the extent that it is caused by other than railroad needs and does not increase the traffic of the railroads or save them expense, it may be that this burden should justly be shifted from the shoulders of railroad users.

[fol. 183] Railroad managements face new conditions which compel changes in methods of operation, manner of service, and price policies. It is a situation which frequently confronts private, competitive industries, and they have become accustomed to such readjustments by force of necessity. It is different with the railroads. Although

they have never had a complete transportation monopoly, they have in the past occupied the field with sufficient exclusiveness so that, apart from competition with each other, their habits of thought are less flexible and not so well adapted to facing and meeting new competitive conditions. This they must now do. The spur of present adversity will no doubt help to that end.

Foremost among the problems to be solved is that presented by the passenger service. Broadly speaking, this service for the country as a whole fails by something like $450,000,000 annually to contributing its proportionate share toward taxes and return on railroad property. The close similiarity of this figure to the amount of money which the carriers estimated that they would realize from the 15 per cent increase, if no loss of traffic resulted, is striking. In other words, if the carriers were able to conduct the passenger business as profitably as the freight business, they would even now, under adversity in a period of great depression, be earning enough to stabilize their credit situation. The freight business as a whole is doing reasonably well, present conditions considered. The carriers in this record pointed out the substantial curtailments of passenger service which have been made in an endeavor to reduce losses. They have also undertaken experimental service in the hope of recovering profitable patronage. But much more drastic measures will be necessary if the staggering deficit incurred by that service is to be reduced to bearable proportions. A little has been done in the pooling of competitive train service by rival lines, but we believe that the opportunities in this direction have by no means been exhausted. Much more can be done under existing law. On some lines it may be necessary for the companies to retire from the passenger business entirely. On others it may be that better service with lighter trains at greater speed and at lower fares will revive patronage and reduce expense. Our knowledge is too inadequate to enable us to specify the remedies which must be applied. But plainly the situation is in need of drastic attention.

So far as freight service is concerned, the railroads have so many and so great inherent advantages of economy, particularly in the case of the longer hauls and the heavier traffic, that we cannot believe that they will not be able to withstand the competition of the motor trucks. It may

be that some traffic must permanently be surrendered to the trucks, but for the most part it is traffic on which the [fol. 184] railroads have always claimed that they lost money. To meet this situation effectively, however, it is evident that radical changes in service and rates must be made. Means, mechanical and otherwise, of making the necessary changes in service are already beginning to appear in the foreground in rapidly increasing volume. They will require trial and test to demonstrate their efficiency, but that some of them will at length pass through the experimental stage to successful adoption we have no doubt. So far as rates are concerned, it is clear that the present structure has developed under principles and theories which gave no thought to the competitive agencies of transportation which now exist. As a result, the rates often open a door to effective competition which might well be closed. It is evident that the traffic departments must give new thought to the rate structure in the light of existing conditions.

The new competitive conditions make it necessary, also, for the railroads to cooperate more efficiently with each other and reduce the waste, both in service and in rates, which has marked their own competition. That this waste is of very large proportions is clear. Many specific instances have been brought to our attention. That it can be minimized we also have no doubt, but this will require a greater degree of cooperation than the railroad executives have yet been willing to put into practice is plain. Such cooperation, which we believe the times make essential, would also be of great advantage in carrying on adequate research and experimentation.

The record shows that in the past decade the railroads have made great strides in improving their service and at the same time operating with greater efficiency and economy. But what they have done in this direction has largely followed lines which developed under conditions different from those which now prevail, and it has been characterized by a continual intensifying of their own competition. At a time when as an industry they have new enemies to face, their warfare with each other has grown more bitter, so that economies in operation have been offset in part by the growth of competitive waste.

All this is contrary to the spirit of the Transportation Act of 1920. Congress then looked beyond the individual railroad to the concept of a national transportation system. It pointed the way in the consolidation provisions to the reduction of competitive wastes. It went to the extreme of removing the barriers of restrictive Federal and State anti-trust legislation which might otherwise stand in the way. Short of consolidations, it opened wide the door to agreements for the pooling of service and of revenue, whenever it could be shown to our satisfaction that such agreements were in the public interest. Much has been accomplished in the way of unification, but much remains to be done, and [fol. 185] the pooling provisions of the law stand almost unused. Further progress along the lines pointed out by Congress will aid in bringing about the cooperation which is essential to railroad salvation. But the problem can not wholly be solved in this way, nor is there need that cooperation should be subordinated to the consolidation program.

In the meantime we have under way an investigation, Ex Parte No. 104, into such railroad practices as may adversely affect net earnings, and we shall pursue this inquiry with diligence.

The committees representing the security holders have suggested the formation of a special commission to consider the needs of the railroad situation. Such procedure has been followed in England, and it is receiving consideration in Canada, whose problems are very like our own. We have no authority to constitute such a commission and are, therefore, not in a position to follow up this suggestion.

Commissioner Tate concurs in those portions of the report and order which dismiss the petition of the carriers for a fifteen per cent increase in freight rates and which discuss the desirability of attention on the part of the carriers to economies and to competition with other means of transportation and the probable desirability for seeking some character of legislative relief; and further in the portions discussing a plan to be worked out so that application of any increase be so applied that interest on bonds of all railroads, weak or strong, be paid, at least pro tanto; but he dissents from those portions increasing any rates in any respect or in any amount in this proceeding.

An appropriate order will be entered denying the application.

[fol. 186] Appendix

Plan for Increasing Freight Rates

In the tables which follow, the generic descriptions of commodities or commodity groups are those specified in the order of the Commission, Division 4, of November 22, 1927, In the Matter of Freight Commodity Statistics. They cover the specific items customarily included by the carriers in their reports to the Commission under each numbered description.

The plan is that on commodities included under the following numbered descriptions there shall be no increase:

Number	Description
10	Wheat.
20	Corn.
30	Oats.
40	Barley and rye.
41	Rice.
42	Grain, n. o. s.
50	Flour, wheat.
51	Meal, corn.
52	Flour and meal, edible, n. o. s.
61	Mill Products, n. o. s.
70	Hay and alfalfa.
71	Straw.
90	Cotton in bales.
91	Cotton linters, noils, and regins.
100	Cottonseed.
120	Apples, fresh.
122	Berries, fresh.
124	Grapes, fresh.
125	Peaches, fresh.
127	Fruits, fresh, domestic, n. o. s.
130	Potatoes, other than sweet.
150	Beans and peas, dried.
162	Flaxseed.
163	Sugar beets.
170	Horses, mules, ponies, and asses.
180	Cattle and calves, single-deck.
181	Calves, double-deck.
190	Sheep and goats, single-deck.

Number	Description
191	Sheep and goats, double-deck.
200	Hogs, single-deck.
201	Hogs, double-deck.
400	Logs.
402	Wood(fuel).
410	Ties, railroad.
443	Excelsior (wood) and sawdust.

[fol. 187] On commodities included under the following numbered descriptions there may be an increase of $3.00 per car:

Number	Description
200	Anthracite coal.
300	Bituminous coal.
310	Coke.
320	Iron ore.
330	Copper ore and concentrates.
331	Lead ore and concentrates.
332	Zinc ore and concentrates.
333	Ores and concentrates, n. c. s.
350	Gravel and sand (other than glass or moulding).
351	Stone, broken, ground, or crushed.
392	Products of mines; n. o. s.
401	Posts, poles, and piling.
420	Pulp wood.
430	Lumber, shingles and lath.
431	Box, crate, and cooperage materials.
432	Veneer and built-up wood.
443	Products of forests, n. o. s., except excelsior, (wood) and sawdust.
692	Furnace slag.

On commodities included under the following numbered descriptions there may be an increase of $6.00 per car:

Number	Description
390	Phosphate rock, crude (ground or not ground).
391	Sulphur (brimstone).
490	Iron, pig.
693	Scrap iron and scrap steel.

Number	Description
352	Stone, rough, n. o. s.
353	Stone, finished, n. o. s.
360	Petroleum, crude.
370	Asphalt (natural, by-product, or petroleum).
552	Artificial stone, n. o. s.

On commodities included under the following numbered descriptions there may be an increase of 1 cent per 100 pounds:

Number	Description
101	Cottonseed meal and cake.
110	Oranges and grapefruit.
111	Lemons, limes, and citrus fruits, n. o. s.
123	Cantaloupes and melons, n. o. s.
126	Watermelons.
140	Cabbage.
141	Onions.
142	Tomatoes.
143	Vegetables, fresh, n. o. s.
151	Fruits, dried or evaporated.
152	Vegetables, dried, n. o. s.
160	Vegetable-oil cake and meal, except cottonseed.
161	Peanuts.
164	Products of agriculture, n. o. s.

[fol. 188]

Number	Description
440	Rosin.
441	Turpentine.
450	Petroleum oils, refined, and all other gasolines.
451	Fuel, road, and petroleum residual oils, n. o. s.
452	Lubricating oils and greases.
453	Petroleum products, n. o. s.
540	Cement, natural or Portland (building).
550	Brick, common.
551	Brick, n. o. s., and building tile.
560	Lime, common (quick or slacked).
630	Ice.
640	Fertilizers, n. o. s.

On all other commodities, including all less-than-carload freight, there may be an increase of 2 cents per 100 pounds.

The increases set forth above are subject to the following provisos:

1. In no event shall the increase levied on any carload be in excess of 10 per cent of the carload charges which would be assessed in the absence of the increase.

2. In the case of less-than-carload freight, no increase shall be assessed for hauls for which the applicable or corresponding class rates are assessed on a basis of not more than 175 miles, and the increase for hauls over 175 miles and not more than 250 miles computed in like manner shall be 1 cent per 100 pounds.

3. Where rates are stated in schedules in dollars per car and the increase, as shown above, is an amount per 100 pounds, the increase shall be $7.50 per car if such amount per 100 pounds is 1 cent, and $10.00 per car if such amount is 2 cents.

4. In the case of rates on petroleum products and on furniture, covered by the orders in No. 17000, Parts 4, 4A, and 5, they shall not, on and after the dates when the rates covered by such respective orders become effective exceed the maximum rates therein prescribed.

Switching and Lighterage Charges

All switching charges may be increased 10 per cent, subject to the exception that in the case of the Chicago switching district (Illinois-Indiana) the charges, on and after the date when the rates covered by the order in No. 19610 become effective shall not exceed the maxima therein prescribed.

Joint Rates to and from Foreign Countries

It is not intended to increase the proportions of joint through rates to or from points in foreign countries accruing for the transportation in such foreign countries; the proportions of such rates accruing within the United States may be increased to the extent herein approved for domestic rates.

Boat Lines

The increases herein suggested may in like manner be applied to rates of the boat lines subject to the Act.

[fol. 189] Combination Rates

It is the intention to authorize but one increase on any particular through shipment, however the total rate is constructed or ascertained.

Fourth Section Departures

If the adoption of the different rates of increase herein suggested results in any violation of the aggregate-of-intermediates or long-and-short-haul provision of section 4 (1) of the Act, the carriers should take prompt steps to remove the violation or promptly make applications for relief.

Rates Prescribed and Not Yet Effective

It is contemplated that the increases herein set forth will be superimposed upon the rates now in effect, whether established by order of the commission or the voluntary act of the carriers (including rates held under investigation and suspension orders), and also upon rates prescribed by outstanding orders of the commission not yet in effect, when and as the rates therein prescribed become effective, subject to the exceptions noted above.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 190] Exhibit No. 2 to Answer of I. C. C.

17317

Interstate Commerce Commission

Fifteen Per Cent Case, 1931

Ex Parte No. 103

In the Matter of Increases in Freight Rates and Charges

Submitted November 28, 1931. Decided December 5, 1931

Upon further hearing of oral argument, former report, 178 I. C. C. 539, modified by vacating certain conditions attached to increases in rates authorized and by changing somewhat methods used in determining in each instance the amount of the increase

Alfred P. Thom and J. M. Souby for Association of Railway Executives; Charles C. Paulding for Association

of Railway Executives and New York Central Lines; Henry Wolf Biklé for committee of counsel for carriers; Luther M. Walter for New Orleans Public Belt Railroad; Charles E. Cotterill for Southern Traffic League; E. S. Gubernator for Lehigh Portland Cement Company; Herbert Fitzpatrick for Association of Railway Executives; T. D. Geoghegan for Southwestern Virginia, Incorporated, and West Virginia Live Stock Growers and Shippers; John E. Benton and Clyde S. Bailey for legal committee of western group, State commissions; R. C. Fulbright for Southern Pine Association; C. R. Marshall for Growers & Shippers League of Florida; and John F. Finerty for American Smelting & Refining Company, Kennecott Copper Mining Company, and National Sugar Refining Company.

Other appearances shown in the original report.

Supplemental Report on Reconsideration

By the COMMISSION:

In the original report in this proceeding, 178 I. C. C. 539, we found that carriers subject to the interstate commerce act should be authorized to make comparatively small increases in rates for the transportation of certain freight articles for the purpose of increasing their operating revenues and thereby improving their credit and to enable them to maintain an adequate transportation system. An extensive investigation made by us in the premises, in which hearings were held in different parts of the United States, established that, by reason of the present depression and the rapid development since the depression began of other transportation facilities with which the carriers have been and are in competition, the reve- [fol. 191] nues had become depleted to such an extent as to threaten the ability of the carriers to continue to furnish such transportation services as the public needs and must have. The freight articles selected by us in this connection were those for the transportation of which we believed the rates could be somewhat increased without causing the traffic to be transferred to other agencies of transportation and without bringing about an undue disturbance in business conditions or transgressing the bounds of maximum reasonable rates.

However, we further found that these increases were justified only as a temporary, emergency measure, and primarily and principally to assist some of the carriers in connection with the payment of their fixed charges. We therefore stated that the increases, in the absence of action to the contrary taken by us, should expire on March 31, 1933, and that meanwhile the income therefrom should be kept separate from other operating income of the carriers, placed in a pool, and used in connection with the payment of fixed charges and for other purposes as described in our original report. In this connection, among other things, we said:

Some carriers have obligations that are already in default, some are now in receivership, and some derive less than 50 per cent of their revenue from freight transportation. Such carriers should neither contribute to, nor receive from, the fund created, and they should be allowed to retain the full amount of the revenue accruing to them from the increased rates. The applicants should set up the machinery for operating and should operate the plan. At the end of six months or other appropriate interval, any balance remaining in the fund so created should be distributed to the carriers in the proportions in which earnings accruing on their properties have contributed to it.

The increase provided for in the appendix will be conditional upon the submission by the carriers, on or before December 1, 1931, for our approval under the interstate commerce act, of such a plan as is above described for the division among them of the gross proceeds derived from the increase. The plan submitted should provide that the revenues received from such increases should be earmarked and should be used for the purposes and in the manner above provided, and not otherwise. The increases herein proposed should be accepted as an entirety. If, for competitive or other reasons, the carriers decrease any of the rates so increased, the amount of the decrease should be taken from the basic rates rather than from the earmarked increases provided herein. Upon such submission and approval, we shall grant the necessary authority under section 6 for filing the blanket supplements, and those will be permitted to take effect without suspension, subject to the proviso that we shall reserve discretion to

require minor changes in the details thereof; and that the resulting rates will in all respects be subject to investigation and determination as to the lawfulness of particular rates or schedules of rates, as provided by the act.

Our original report was issued October 16, 1931, and thereafter the carriers filed in our office a petition, in which they alleged, in substance, that the pooling plan provided for by us could not as practical matter be applied, and requested us to permit them to substitute there- [fol. 192] for what has been referred to in this proceeding as a loaning plan, that is to say, they asked for permission to use the sums of money to be placed in a pool as aforesaid for the purpose of making loans, through an agency to be created by them, for the payment of fixed charges, etc., as had been described by us. They also asked us to make a few other comparatively unimportant changes in our original report.

After due notice to interested parties they were heard by us in oral argument in connection with the matters covered by the petition, and at that hearing counsel for the carriers contended that the impracticability of putting in force the pooling plan outlined by us results principally from the lack of authority on the part of representatives of some of the carriers to treat sums of money received for transportation services performed by such carriers as the property of other carriers and allow the latter to use those sums in paying their fixed charges. Pertinent language used by counsel for the carriers in this connection is:

> Many of the directors of these railroad companies have been advised by their counsel that a vote to dispose of the earnings in question as a gratuity would, or might, render such directors personally liable to any objecting stockholder, and, in fact, there is substantial reason to apprehend that an effort to do so would at once be enjoined by stockholders and the whole matter be thrown into court, with a consequent delay that would in itself defeat the Commission's purpose.

Counsel for the carriers also pointed out that, in connection with the subject matter of pooling, the only authority

specifically conferred upon us is contained in section 5 (1), which reads:

Sec. 5 (1) That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this Act, it shall be unlawful for any common carrier subject to this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: Provided, That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

[fol. 193] Upon this subject, counsel for the carriers, among other things, said:

That paragraph contemplates a pooling, under certain conditions, of the earnings of "competing" carriers—of carriers which, for purposes of economy, parcel out between them services which all might perform and justify it by pooling and dividing among them the revenues derived from all the services so parceled out. On the other hand, the pool here is to be contributed to by all the rail carriers, whether competing or not, and is clearly not a pool of the earnings only of competing carriers or of carriers bearing the same or similar relationship to the service. It not being within that section, there is not author-

ity in law for such a pool, and the question of its legality must be determined on general legal principles.

In addition to making contentions as above stated, counsel for the carriers urged that use of the loaning plan will enable the carriers to accomplish the purposes we had in view when we provided for the use of the pooling plan, and at the same time enable the carriers to avoid the legal difficulties necessarily connected with the latter plan. Contrary views were expressed by counsel representing some of the shippers, but no such opposition was voiced by counsel representing any carrier subject to the interstate commerce act. In this connection, it will be observed that the rates to be paid by shippers will be the same under either plan.

We are not prepared to admit that the construction placed upon section 5 (1) of the act by counsel for the carriers is correct, but we realize that the language contained in that paragraph is not sufficiently definite to exclude differences in views concerning its meaning, and that for this reason the legal difficulties mentioned have at least some foundation upon which to rest. Also, we have no reason for treating otherwise than as made in good faith the representations on behalf of the carriers to the effect that they will use the sums of money, which are to be placed in a pool as hereinbefore stated, to accomplish the purposes described in our original report. It is further true that we are impressed by the absence, on behalf of any carrier, of opposition to the loaning plan mentioned. In addition to the above, we believe it to be pretty clearly indicated, by matters called to our attention in oral argument and otherwise developed in the course of this proceeding, that an agreement to adopt and put in force the pooling plan provided for by us can not be obtained, and in the absence of such an agreement our plan could not be made effective, since, as above shown, we have no authority to require such pooling.

For the reasons above set forth, and because we desire to act promptly in this proceeding, in accordance with the duties imposed and the authority conferred upon us by the interstate commerce act, and avoid delays which will be injurious to the general public, including the carriers, [fol. 194] we hereby modify our original report to the ex-

tent of relieving the carriers from the necessity of complying with the pooling plan therein described. This will leave them free to apply in the premises their own loaning plan, but, since use of the latter plan will not be pooling, within the meaning of that term as used in section 5 (1) of the interstate commerce act, and because loans by and between common carriers, as such, have not been included within the jurisdiction conferred upon us by Congress, we neither approve nor disapprove either the loaning plan or the agency the carriers say they expect and intend to use in making that plan effective. However, we rely on them to apply the funds to be derived from the authorized increases in rates in aid of financially weak railroads in accordance with the purposes expressed in our original report and in the instant application pursuant thereto and the arguments thereon presented.

We also hereby amend our original report to the extent of relieving the carriers from the restriction contained in language hereinbefore quoted which is as follows:

* * * The increases herein proposed should be accepted as an entirety. If, for competitive or other reasons, the carriers decrease any of the rates so increased, the amount of the decrease should be taken from the basic rates rather than from the earmarked increases provided herein. * * *

Objection has been raised to the imposition of the so-called double increase where there are movements subject to the act separated by an intermediate movement not subject to the act. This applied particularly to movements of ore and coal through lake and ocean ports. There are practical difficulties in the way of accomplishing this by general provisions such as are made in this report. Therefore shippers and carriers are left free to endeavor to work out this situation between themselves.

In the appendix under the caption "Switching and Lighterage Charges" we authorized certain increases for switching only. The omission of lighterage and floatage charges from the increases so authorized was unintentional. The same increases for these charges as for switching are authorized in the revised appendix hereto.

Because of certain practical difficulties that exist in determining distances and in view of the smallness of the increases, we have concluded, upon more mature considera-

tion, to authorize an increase of 2 cents in all less-than-carload rates.

In the revised appendix hereto the articles originally made subject to increases of $3 and $6 per car have been made subject to increases in cents per 100 pounds or per ton, the assignment of the respective commodities to the respective lists having been made on an approximate-weight basis.

[fol. 195] The revised appendix also makes certain changes in the classification of commodities, the desirability of which has become apparent since our original report was issued.

LEE, Commissioner, concurring specially:

It was our view when the original report was adopted that, while the carriers had signally failed to justify their application for a horizontal increase in freight rates, their credit situation justified us in permitting the establishment of certain increases to enable the weaker roads to meet their interest requirements. We, therefore, told the carriers that we would permit them to make certain specified rate increases on condition that the funds realized therefrom should be pooled for the benefit of the weaker roads, to the extent of their interest requirements.

The carriers now represent that there are certain legal objections to the conditions imposed by us for the distribution of the pooled earnings, and ask authority to make such distribution on a loan basis. To meet the emergency which now confronts the railroads, I am firmly convinced that our plan is preferable to the loan plan proposed by the carriers. It is evident, however, that there is such opposition to our plan that the carriers will not be able to put it into effect. In this situation some of my brethren adhere to our original report. There is much in reason to support their position. On the other hand, the majority allows the increased rates to be established without the imposition of any condition. After we found that no increase had been justified and permitted the establishment of slight increases only on the express condition that the earnings produced thereby would be used, to the extent necessary, to meet interest requirements and protect railroad credit, the majority now allows the increases without any condition or restrictive requirement whatever. As between these ex-

tremes, it is my position that, in view of the conditions in which the railroads find themselves, we should grant their application to the extent of permitting them to make the increases specified on condition that they loan to the needy carriers such portion of the fund resulting therefrom as may be necessary to meet interest charges. It seems to ma, however, that such loans should be made at a nominal rate of interest and without security.

EASTMAN, Commissioner, dissenting:

The vital purpose which we sought to accomplish in the general interest through the pooling plan set forth in our prior report can not be accomplished nearly as well by the [fol. 196] plan which the carriers propose. Nor, since the majority now leave the latter plan wholly within the discretion of the carriers, is there definite assurance that the purpose will be accomplished at all. No occasion exists for beating such a retreat. Our plan is both lawful and reasonable. There is no sound reason for discarding it in favor of the inferior substitute which is now proffered.

Owing to the brevity of the majority report, it is necessary to supply pertinent information in this opinion, in order that the essential issues may be understood.

The original application of the carriers was for authority to increase all interstate freight rates and charges 15 per cent. We reached the conclusion, upon the evidence presented, that such an increase "would increase revenues, if at all, only temporarily and that its ultimate effect, not very long postponed, would be to harm rather than help the railroads." We also concluded that "such an increase would raise the rates upon many kinds of traffic above a just and reasonable level." For these reasons the application was denied.

We pointed out, however, that it did not follow that no increase in rates should be made at this time. Some important increases we had already authorized, to become effective shortly. We stated our further belief that the traffic departments of the railroads should address themselves to the task of making such changes in the rates on particular kinds of traffic as will, in their judgment after careful analysis of all attendant circumstances, produce additional revenue and which can be supported as reasonable under existing conditions.

If tariffs were filed, in accordance with this suggestion, we said that we would be—

guided, in determining whether they shall be suspended, not only by the statements filed in support and protest, but also, in part, by our general knowledge and the record in this proceeding as bearing on the particular kind of traffic in question.

To the extent that suspension proceedings might be initiated, we promise to expedite their disposition.

Under ordinary circumstances, upon such a record as was before us, we would have stopped at this point and with this suggestion. It gave the carriers opportunity to mend the deficiencies of their case and propose increases, or other changes in rates, which could be justified. It gave assurance, also, that such proposals would receive sympathetic and expedited consideration. This opportunity still stands and will remain open.

[fol. 197] The Pooling Plan

But circumstances were not ordinary, and therefore we did not stop with this suggestion. We made a further proposal "for the consideration of the railroad executives in the immediate emergency, and only as a temporary measure of relief." It was motived by the thought that the—

distrust of railroad securities is rapidly gaining such elements of panic that a slight charge on the traffic of the industries of the country best able to stand it may justifiably be imposed, through freight rates, for the purpose of increasing confidence and averting developments which might further disturb an already tremendously shaken financial situation, and to avoid impairment of an adequate system of transportation.

The plan was designed as an emergency measure in the hope that it would help the general financial situation with benefit to all concerned, and it sought to produce the maximum effect of this character consistent with the imposition of minimum burdens upon distressed industry and minimum disturbance of business conditions. To this end it appealed to a spirit of cooperation on the part of both shippers and carriers.

We did not propose increases in all rates, but only where we thought the burden could reasonably be borne with limited danger of diversion of the traffic to other forms of transportation. Nor did we propose increases in ratio to transportation service performed. To minimize disturbance of business conditions, we suggested increases on particular kinds of traffic which would be, generally speaking, in uniform amounts. Thus the short-haul shipper was asked to bear a much larger increase, in ratio to existing rates and transportation service rendered, than the long-haul shipper.

In like spirit of cooperation the railroads were asked to agree to a pooling plan. The emergency was a financial one and affected credit primarily. This had been stressed both by the carriers and by their security holders. The earnings of some of the carriers were ample to sustain their credit, and as to them, considered individually, no emergency existed. It was created by the needs of carriers less fortunate but which, like the others, were essential parts of the national transportation system. Except for the danger confronting these less fortunate carriers, our emergency rate proposal would not have been made.

We thought it proper and appropriate, therefore, to ask all the carriers to agree to a plan whereby the funds derived from the emergency increases would be used in the first instance to poultice the sore spots which threaten the health of the national transportation system. We did not, however, seek to bring the carriers to anything like a com-
[fol. 198] mon level of earnings or to deprive those which were more prosperous of direct benefit from the increases. The pooled earnings were to be applied in the first instance merely to the prevention of defaults in fixed charges. The remaining balance, which we estimated would be substantial, was to be distributed in ordinary course. Moreover, being an emergency measure, the pool was limited to a period ending March 31, 1933.

We made no finding that the rates resulting from the increases proposed would be just and reasonable. No such finding was necessary. Following submission of the pooling plan and its approval by us, we said that we would grant the necessary authority under section 6 for filing blanket supplements, and that those would be permitted to take effect without suspension, upon the understanding, however,

"that the resulting rates will in all respects be subject to investigation and determination as to the lawfulness of particular rates or schedules of rates, as provided by the act." The plan, in short, was regarded as something apart from our ordinary rate procedure, adapted to an emergency use for the benefit of all concerned, and to be made effective through such a spirit of cooperation as might reasonably be expected in a time of distress. It has been received in this spirit by the shippers of the country.

The Carriers' Plan

The carriers are averse to accepting the plan in the form in which it was proposed, and in the petition now presented ask that we approve a new and different plan, which they say will accomplish the same ends. There has as yet been no final and definite refusal to accept our plan, but it is said that the modification suggested "will relieve legal difficulties which are regarded as substantial by those responsible for the management of the carriers and will remove serious obstacles in the way of carrying the plan into successful operation."

The carriers do not in terms propose their plan as a new and different plan, but contend rather that it is consistent with one of two possible interpretations of our suggestion. These two interpretations, according to their petition, are:

One, that the amounts arising out of the increase in the rates scheduled, in the appendix to the report, to be increased, are, to the extent necessary to carry out the plan, to be distributed to certain of the participating carriers as gratuities, and the other, that such amounts may be treated as loans.

Neither of these interpretations is correct. It was not our thought that the distributions to be made out of the pooled funds to certain carriers were to be treated as loans, [fol. 199] nor is there anything in our discussion of the matter which is susceptible of such an interpretation. Neither did we regard these distributions as gratuities. On the contrary, our thought corresponded with that of the Supreme Court in New England Divisions Case, 261 U. S. 184, 196:

It is not true, as argued, that the order compels the strong railroads to support the weak. No part of the revenues

needed by the New England lines is paid by the western carriers. *All is paid by the community* pursuant to the single rate increase ordered in *Ex Parte* 74. [Emphasis supplied.]

Briefly, the new and different plan proposed by the carriers is that a corporation, to be called the Railroad Credit Corporation, shall be created under a Delaware charter for the purpose of collecting, receiving, and administering the fund derived from our proposed rate increases. All rail or water carriers, rates of which are subject to our jurisdiction, may file tariffs providing for these increases, and all carriers by railroad may by assent participate in the plan, except such as are already in default as to their fixed charges or in receivership or which derive less than 50 per cent of their revenues from freight transportation. The plan is to become effective "only when those who have assented thereto all agree that a sufficient number have assented to make it practically operative." It might thus become operative without the assent of all eligible carriers, in which event those not assenting would gain full benefit from the rate increases without assumption of any obligation with respect to the weaker carriers.

The participants will be obligated to turn over to the Corporation, within specified times, the gross revenue received from the rate increases, subject to a right of refund for any tax payment because of such receipt. The Corporation, it is asserted, will use the fund to carry out our "purpose to prevent, so far as practicable, defaults by railroad companies in their fixed charges." To that alleged end it will be its duty, upon application of any participating carrier, to loan it such amount as may be necessary for this purpose. But this duty is subject to substantial qualifications.

No loan is to be made to a carrier "which is able to meet its fixed charges from its earnings, other income or other resources," or which, "with the aid of the loan from the Corporation, would still be unable to meet its fixed charges or to avoid a default," or which has not complied with its obligations relative to payments to the fund. In determining the amount of the deficiencies in the earnings of an applicant and the necessity for making it a loan, "the amount actually expended for maintenance (but not the

amount charged to operating expenses on account of depreciation and retirements) in the period from July 1, 1930, to June 30, 1931, shall be used as the maximum of its main- [fol. 200] tenance charges, unless in the discretion of the Corporation a different period should in a special case be justified." Interest is to be charged "at the then current rediscount rate of the Federal Reserve Bank in the New York District," such rate to be adjusted quarterly. The loan is to fall due at such time as may be agreed upon, not exceeding two years, but may be renewed for an additional period of not exceeding two years, "at the discretion of the Corporation." In making loans, the Corporation "shall take as security the best available collateral, including, if required by the Corporation, the pledge of the amounts due or to become due an applicant" on distribution of the funds to the participating carriers. The Corporation is given discretion, however, "in the case of any important public interest," to relax these security requirements.

It is conceded that under the proposed provisions the Corporation will have a large element of discretion in the making of loans to participating carriers, and also in their collection and the terms and conditions attached to the loan. It is also conceded that this discretion is such that no participating carrier could compel the making of a loan by mandamus.

The Corporation is required, by the terms of the agreement, to make monthly reports to us "of its receipts, loans and disbursements, together with a summary of its current financial condition," and we may also require it to render other periodical reports, and have access to its books and records for inspection and audit. We shall have no statutory authority whatever over the Corporation.

In presenting our plan, we said that "appropriate provisions should be made as to the accounts of carriers reporting separately but operated as part of a system." The thought was that deficiencies in earnings should be treated from the point of view of system results, instead of dealing separately with individual carriers constituting parts of a system. In the carriers' plan, every participating carrier which makes a separate operating report to us, and which otherwise qualifies, will have the right to apply for and receive loans.

At least once in every six months, the Corporation is to review its needs for funds to carry out and accomplish its purposes, and in the event of a balance over and above requirements, "such balance shall be distributed to the participating carriers in the proportion in which their respective earnings," allowing for interest on delayed payments and tax refunds, "contributed to the fund." The obligation to pay into the fund is to continue "until such payments shall have been made in respect to all traffic moved up to and including March 31, 1933," and the Corporation is to function thereafter for such time as may be necessary to collect all outstanding loans, make distribution of remaining [fol. 201] funds to the participating carriers, and wind up its affairs.

While the Corporation is to be organized "primarily" for the purpose above stated, its charter is of the Delaware type and exceedingly broad, authorizing it, for example, "to invest, trade, deal in and deal with goods, wares, and merchandise and real and personal property of every class and description." It has all the usual "holding company" powers. The stock is limited to 12 shares of the total par value of $1,200, but apparently no difficulty would be experienced in increasing, by amendment, this authorized amount. Eleven shares are to be held by the Association of Railway Executives and one share by the American Short Line Railroad Association. There are to be 12 directors, 5 to be nominated by participating carriers of the eastern district, 3 by such carriers of the western district, 2 by such carriers of the southern district, 1 by the American Short Line Railroad Association, and 1 by the stockholders. In making nominations, participating carriers are to have voting power in ratio to their contributions to the fund.

Pooling in the Past

Before considering the carriers' objections to our proposed pooling plan, it may be well to say something about pooling as it prevailed in the past. In the 20 or more years preceding the enactment of the act to regulate commerce in 1887, it was common practice for the carriers to pool traffic or earnings. This was a period of intense and often disastrous railroad competition. Rate wars were frequent, published rates were not observed, and flagrant discriminations prevailed. To alleviate this competition and prevent it from becoming destructive, pools were established.

Some of these were traffic pools, but others were pools of earnings. The attempt was to divide competitive traffic or the earnings thereform in the percentages which rival routes would enjoy under assumed conditions of normal competition. In the case of a traffic pool, the endeavor was to give each route, by diversions if necessary, its agreed percentage of actual traffic. Where earnings were pooled, each road sought to handle all the traffic which it could obtain, but a large portion, usually more than half, of the revenue collected therefrom was turned over to the pool, and these pooled earnings were divided in the agreed percentages. It therefore came about that one road might eventually receive substantially more and another road substantially less revenue than it collected.

There was a doubt whether these pooling agreements could, because of considerations of public policy, be enforced [fol. 202] in court, and that doubt hampered their successful operation; but they were widely resorted to and often were effective. Section 5 of the original act to regulate commerce, however, prohibited contracts or agreements of carriers "for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof." The decision in United States v. Trans-Missouri Freight Assn., 166 U. S. 290, made it clear that such agreements are also unlawful under the Sherman Anti-Trust Act of 1890.

For some years after the approval of the act to regulate commerce in 1887 the carriers were insistent that the anti-pooling provision of section 5 was the chief error in that act, and that if pooling were permitted under public supervision the then existing evils in the railroad situation, which included financial impoverishment, would largely be eliminated. They repeatedly sought an amendment of the act to that effect, but no change was made until 1920 when, upon our recommendation, we were given authority in the transportation act, 1920, to approve pooling agreements under certain conditions, such an approval operating as a bar against all statutory prohibitions or restraints, State or Federal. Since this amendment, however, we have been asked to approve such agreements only in a very few instances of limited scope. The extent to which pooling, once predominant in railroad thought, has been forgotten

in the home where it was born is indicated by the fact that in the argument on the pending petition counsel for the Association of Railway Executives stated that he was not familiar with the character of the pools which existed prior to 1887.

Legal Obstacles

So much for history. The legal obstacles which are alleged to stand in the way of the acceptance of our plan are indicated in the majority report, but for convenience the statement of counsel for the executives upon this point is also reproduced here:

> Many of the directors of these railroad companies have been advised by their counsel that a vote to dispose of the earnings in question as a gratuity would, or might, render such directors personally liable to any objecting stockholder, and in fact, there is substantial reason to apprehend that an effort to do so would at once be enjoined by stockholders and the whole matter be thrown into court, with a consequent delay that would in itself defeat the Commission's purpose.

None of these opinions, said to have been given by counsel, was presented for our consideration.

It is also argued that our approval of the proposed pool would not affect its legal status, inasmuch as it is not the [fol. 203] case of such a pool as is contemplated by section 5 (1) and as we have specific authority to approve. The argument, as also indicated in the majority report, is thus stated:

> That paragraph contemplates a pooling, under certain conditions, of the earnings of "competing" carriers—of carriers which, for purposes of economy, parcel out between them services which all might perform, and justify it by pooling and dividing among them the revenues derived from all the services so parceled out. On the other hand, the pool here is to be contributed to by all the rail carriers, whether competing or not, and is clearly not a pool of the earnings only of competing carriers or of carriers bearing the same or similar relationship to the service. It not being within that section, there is not authority in law for such a pool, and the question of its legality must be determined on general legal principles.

It is further asserted that even if this were not the case, it would make no difference, because the effect of our approval is merely to prevent the pool "from being a violation of law and thus an offense against the Government," and not to "change or to modify the fiduciary relationship between the stockholders of a company and its directors."

Considering first the argument as to the application of section 5 (1), it is obvious that under any conception of competition a competitive relation exists between many of the carriers which would participate in the proposed pool, and that if such conception be enlarged, as it must necessarily be, to include the competition of carriers which serve producers or communities competing in a common market, that relation exists as to most, if not all, of the participating carriers. Of this latter form of competition, we said, in City of Spokane v. N. P. Ry. Co., 21 I. C. C. 400, 414:

> Strictly speaking, there is no such thing as market competition which is distinct from competition between the lines of transportation serving the market. A market can only compete through the agency which transports for it. The carrier makes a rate from a given market, not out of favor to that locality, but because it desires to obtain traffic which will not otherwise come to it. There would seem, therefore, to be little distinction between the competition of markets and the competition of rival railroads.

Nor should it be forgotten that the group system of rate making authorized by section 15a, under which certain carriers may receive revenue in excess of their needs, is justified in paragraph (5) of that section by the general existence of competitive conditions and the fact that it is—

> impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, * * *.

[fol. 204]

It is clear that in view of the competitive relation which exists between most, if not all, of the participating carriers, the pool which we proposed would not be lawful without our approval under section 5 (1). The carriers have themselves on two separate occasions sought and obtained our approval under that paragraph of pooling arrangements which comprehended carriers by railroad generally throughout the country, rather than groups of parallel and competing lines. Express Contract, 1920, 59 I. C. C. 518; Securities and Acquisition of Control of Ry. Exp. Agency, 150 I. C. C. 423.

Apart from the above considerations, which are sufficiently controlling, it is significant that the proviso portion of section 5 (1), which empowers us to authorize pooling under certain conditions, does not confine applications for such authority to competing railroads. On the contrary, we may act upon the application "of *any* carrier or carriers engaged in the transportation of passengers or property subject to this Act," and all that it is necessary for us to find is that the contemplated division of traffic or earnings, to the extent which we indicate, "will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition." It is a reasonable inference that Congress, by this use of broader and more comprehensive language in the proviso than in the original prohibition, sought to eliminate technical questions of jurisdiction such as the carriers now seek to raise.

Such a pooling arrangement as was suggested in our prior report is manifestly one which we have specific authority to approve under section 5 (1).

Let us turn, then, to the question of the fiduciary relation of directors to stockholders and the danger that such a pool as we propose would be enjoined by the latter as a breach of trust. It is clear that in the old pools of earnings which existed prior to 1887 a carrier might ultimately receive either more or less revenue than it actually collected for service performed. From this it might be argued that those who received less were extending gratuities to those who received more. The reply which counsel for the executives makes to this suggestion is that such division of earnings was based on a contract made valid by the consideration that all members of the pool received direct financial benefits from it. He asserts that in contrast all partici-

pants in our proposed pool would not receive such benefits, or at least none which constitutes in law a valuable consideration.

It is plain that in the old pools the benefits which accrued to those who contributed more revenue than they ultimately [fol. 205] received were only such benefits as might be gained from greater stability in rates and the lessening of the danger of destructive competition. Under our proposed pool the benefits would be, first, the probable receipt by all the participants of greater revenue, following the ultimate distribution of the fund, than they now enjoy, and, second, positive protection, so long as the pool continued, against a very possible series of railroad receiverships which would further disturb the financial situation, destroy returning confidence, and postpone the day when railroad traffic, earnings, and credit generally will be restored to normal status. Who will venture to say that the benefits to be derived by all of the railroads, both strong and weak, from our proposed pool are not as direct and substantial as were derived by member carriers from the pools of earnings which prevailed in times gone by?

Moreover, even if there were any validity in this contention with respect to the fiduciary relation of directors to stockholders, the question may properly be asked whether it would be any more of a breach of trust to give funds to distressed carriers than to make loans of the same funds to such carriers on terms of security and interest rate which no responsible financial institution would be justified in accepting? Yet it is precisely such loans which would be available, in case of need, if the carriers' plan is to accomplish in all instances, as they contend, the same purpose of avoiding defaults in fixed charges and bankruptcies as we sought to accomplish through our plan. It must be borne in mind, in this connection, that under their plan the carriers propose to make loans only to carriers which are unable to meet their fixed charges from "earnings, other income *or other resources.*"

There remains to be stated, however, the main and controlling reason for believing that our proposed plan would be sustained by the courts if, perchance, there should be stockholders willing in a time of general distress and need for mutual cooperation to incur the odium of seeking to enjoin it. This reason lies in the fact that the plan is in

entire harmony with the concept and spirit which underlie the transportation act, 1920, as it has been interpreted by the Supreme Court. In that act, Congress for the first time dealt with the railroads, not alone as individual entities, but also as parts of a national transportation system to be adequately maintained in the interest of the whole country. It saw that these parts were interrelated, that they were mutually dependent upon each other, and that the transportation service which the country required could not be adequately maintained unless the whole of which they were parts, i. e. the national transportation system, was recognized and protected as such. As the court said in Dayton-[fol. 206] Goose Creek Ry. v. U. S., 263 U. S. 456, 478, the act "adds a new and important object to previous interstate commerce legislation." It "seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country." It was therefore held in that case, among other things, that an individual shipper, because of his interest in the adequate maintenance of "all the railroads necessary to do the business of a rate territory or section," could not complain of a general level of rates higher than would be reasonable considering the immediate service rendered to him alone.

But for present purposes the decision of the Court in the New England Divisions Case, supra, is of even greater significance. That case dealt with divisions of joint rates, and not with a pooling plan, but our order with respect to divisions was most strenuously resisted upon the ground that we had been moved to our action by the financial needs of the New England lines, and that such needs were wholly irrelevant in determining the shares of the joint rates to which the participating carriers were justly entitled. The Court stated this contention thus, at page 189:

> It is contended that the order is void, because its purpose was not to establish divisions just, reasonable and equitable, as between connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation.

Our order could, in our judgment, have been sustained upon the ground that it was not dependent upon the financial needs of the New England lines but sufficiently supported by other facts. Significantly, however, the Court

saw fit to find affirmatively that we were justified in taking these financial needs into consideration. Quoting from the Dayton-Goose Creek case, supra, at page 477:

In the New England Divisions Case, 261 U. S., 184, it was held that under section 418 the Commission in making division of joint rates between groups of carriers might in the public interest consult the financial needs of a weaker group in order to maintain it in effective operation as part of an adequate transportation system, and give it a greater share of such rates if the share of the other group was adequate to avoid a confiscatory result.

The reasoning which supported this conclusion is, however, the vital thing, and we quote that reasoning from the New England Divisions Case, supra, as follows, at pages 190-191:

The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear. A five per cent. increase had been granted in 1914, Five Per Cent. Case, 31 I. C. C. [fol. 207] 351; 32 I. C. C. 325; fifteen per cent. in 1917, Fifteen Per Cent. Case, 45 I. C. C. 303; twenty-five per cent. in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted; the group system of rate-making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of

surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshalling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

Attention is called to the emphasis, in the passage above quoted, upon the need for "marshalling the revenues * * *, largely in proportion to the carrier's needs." This was necessary to "avoid unduly burdensome rate increases and yet secure revenues adaquate to satisfy the needs of the weak carriers." It was pointed out that a "general rate increase alone would not meet the situation"; that there was a "limit to what the traffic would bear"; and that the people might not "tolerate greatly increased rates" for the mere purpose of sustaining weak lines, if the result were to increase the revenues of the prosperous carriers unduly.

It is manifest that this description fits the present situation far more closely than it did that which then existed. The need for such a distribution of earnings is far greater now than it was then. In 1920 there was little question about the ability of traffic to bear large increases in rates, although the Court seems even then to have been impressed with the doubt on this point. Now we have overwhelming evidence of the inability or refusal of traffic to bear any very substantial increases. Clearly it is essential in the interests of all, including the railroads, to keep any increases down to the absolute minimum. On the other hand we have a situation where the needs of many railroads are so pressing and critical that unless they are relieved, defaults and receiverships may ensue which may spread an already impending panic like a prairie fire. Obviously the conditions described by the Court in the New England Divisions Case are present now in extreme form.

The point may be illuminated by further quotations from the Court's decision. On page 195, it considered the con-

[fol. 208] tention "that if the act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers, it is unconstitutional." The argument was "that the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the services rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate and taking from a carrier part of the cash in its treasury; and, thus, that apportionment according to needs is a taking of property without due process." But, said the Court, "the argument begs the question. What is its just share? It is the amount properly apportioned out of the joint rate." That amount "is to be fixed by the Commission; fixed at what that board finds to be just, reasonable and equitable." And the Court concluded its discussion of this point with the following significant statement: "Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues derived therefrom."

It is true that the Court mentioned only two ways of meeting the problem of the weak lines. One was the group system of rate making and recapture, and the other was the "division of joint rates in the public interest." It did not mention a pooling plan such as was proposed in our prior report. But when the decision in the New England Divisions Case was reached, the possibilities of pooling had not been developed. Moreover, the fact was not then appreciated that the division of joint rates is a most imperfect way of meeting the problem. For example, the Pocahontas lines profited more than any other from the group system of making rates in the eastern district; yet they contributed little or nothing to the New England lines through the increase in divisions. These coal roads secure a very large proportion of their ample revenues from purely local rates to tidewater and the lakes. Moreover, adjustment of divisions, due to the complexities involved and the time which must be consumed before an order can be issued, is a process not at all adapted to an emergency situation such as now exists.

It is submitted that the pooling plan which we proposed is consistent throughout with the reasoning of the Court in the New England Divisions Case, and at the same time adapted to the existing emergency. That case settled the

proposition that the mere fact that a carrier collects certain revenue does not make it the owner, and that it may lawfully be required to turn over to another carrier a portion of that revenue which is not justified alone by the service which that other carrier performs and can be fully justified only by consideration as well of its financial needs. It is submitted, also, that if it is lawful to *require* a carrier to dispose in this way, through a divisional arrangement, of revenue which it has collected, it is lawful to permit it to [fol. 209] accomplish a similar result, particularly in a time of emergency, through a pooling arrangement. The justification lies fundamentally in the concept of a national transportation system, of which all the carriers are mutually dependent parts, and the need for maintaining that system adequately.

It is suggested that in the New England Divisions Case the court held that divisions can not be prescribed which will produce a "confiscatory result" for any carrier, and that our plan would accomplish such a result, in view of the fact that many of the carriers which would contribute rather than receive are not now earning a fair return. This suggestion overlooks the fact that present low earnings are due to lack of traffic rather than inadequate rates; that no carrier under our plan would receive less than it now receives; and that in all probability all the carriers would enjoy a gain in revenue. It is a singular thought to regard such a result as "confiscatory."

Summing up the situation, upon analysis the alleged legal obstacles to our plan prove to be without substance. Considered apart from our approval under the statute, there is ample legal consideration for the proposed agreement. When, however, there is also taken into consideration our approval of the plan under specific authority of law, based on a finding that it will be in the interest of better service to the public, will not unduly restrain competition, and will afford necessary safeguards in a financial emergency affecting all of the carriers, directly or indirectly, and this approval is coupled with the fact that the plan is in entire harmony with the concept and spirit underlying the transportation act, 1920, as interpreted by the Supreme Court, it is impossible to be impressed with the fear that it would be held to violate fiduciary relationships, or that it would even be contested on that ground.

Question of Expediency

There remains to be considered the plea that the plan which the carriers propose will accomplish as well as our plan the results which we contemplated, and that no reason exists, therefore, why it should be rejected in favor of a plan which it may prove impossible to carry through. This plea is without merit. The first and foremost reason is that there is no assurance whatever that it will accomplish what we intended.

It is conceded that the contemplated loans, as the agreement is drawn, will lie largely in the discretion of the corporation, a noncarrier company subject under the law to no public regulation or supervision whatsoever. It is con- [fol. 210] ceded that no needy carrier can compel a loan through mandamus or other legal process, and that the discretion with respect to the qualifications of the applicant for a loan and the security which it will be called upon to furnish is such that the exercise of this discretion one way or the other could not be called in question.

And even if the loans are made, the resulting situation will be quite different from what would result under our plan. Under the latter the obligations of the needy carrier would be reduced. Its fixed charges would be met without use of its credit or collateral or the assumption of any additional interest payments. Under the carriers' plan, there will be no reduction of obligations; on the contrary they will be increased. Fixed charges may be met, but only by the assumption of a new and different indebtedness accompanied by depletion of collateral and ensuing interest payments. The carrier may be tided over an immediate danger of default, but only at the expense of a further attenuation of its credit and a mounting indebtedness. The time when, if ever, it can regain its financial health will be postponed materially beyond the time which would be possible under our plan. It is not difficult, however, to understand why the weaker lines should hestitate to antagonize the stronger lines and the railroad financial fraternity by supporting our plan at this time.

In addition, the introduction into the situation of this unregulated private Delaware corporation with its vast potential powers is something which it is difficult to view without foreboding and apprehension. The possibilities of discrimination in the treatment of needy carriers for ends

which may appeal to the dominating carriers as desirable are sufficiently evident. Other possibilities, extending beyond any present anticipation, are manifold and inherent in the plan. It is impossible to approve such a plan as in the public interest, even if there were any assurance that it will accomplish the immediate ends which we have in mind, an assurance which is utterly lacking.

It is clear from the report of the majority that they realize the imperfections of the loaning plan and its inferiority to our pooling plan from the point of view of practical accomplishments. They are careful to disclaim either approval or disapproval of the loaning plan or of "the agency the carriers say they expect and intend to use in making that plan effective." The final result is that the proposed rate increases are approved unconditionally, coupled with an expression of expectation or hope that the funds derived therefrom will be used "in aid of financially weak railroads."

The motive behind this action is evidently fear that if the commission should adhere to the pooling plan, that plan [fol. 211] might be rejected and the commission thereupon be held responsible for financial difficulties which might then ensue. It is submitted that there is no solid ground for such fear. The carriers have been very careful to refrain from any final rejection of our plan; they have contented themselves with a presentation of the legal obstacles said to stand in the way of its acceptance. In view of the above discussion of these alleged obstacles, it may be asserted with confidence that under all of the circumstances there would be no final rejection in the conditions which now exist. But even if this were not so, it is submitted that the sole responsibility of this commission is to propose a lawful and reasonable plan which will meet the situation effectively. If the carriers should be unwilling to accept such a plan in the spirit of cooperation in a time of national distress which the shippers have already manifested, that would be their responsibility, not ours.

Apart from the fact that a sound plan is being exchanged for an inferior substitute, it is a matter of great regret that the carriers have shown an inability to grasp the idea which the Supreme Court has recognized and voiced with such clarity and strength, namely, that the railroads are interrelated and mutually dependent parts of a National trans-

portation system. There has never been a time when a spirit of mutual cooperation and solidarity were more essential to the welfare of the industry. The time has surely come for the railroads, as it came for the sovereign States, "to form a more perfect Union" which will "insure domestic Tranquillity, provide for the common defence, promote the general Welfare." If our plan had been accepted in the spirit in which it was suggested and put promptly into effect, certain recent and unfortunate developments in the railroad financial situation might have been averted.

I am authorized to say that Commissioners McManamy, Porter, and Mahaffie join in this expression of dissent.

Appendix

Plan for increasing freight rates

In the tables which follow, the numbered generic descriptions of commodities or commodity groups are those specified in the order of the commission, division 4, of November 22, 1927, In the Matter of Freight Commodity Statistics. Except as otherwise provided and except where prefixed by circled "1," they cover the specific items customarily included by the carriers in their reports to the commission under each numbered description. Where prefixed by circled "1," the designated descriptions apply only on the commodities specifically here named.

[fol. 212] LIST A

On commodities, in carloads, except as otherwise noted, included under the following descriptions there shall be no increase:

No.	Description
10	Wheat.
20	Corn.
30	Oats.
40	Barley and rye.
41	Rice.
42	Grain, n. o. s.
50	Flour, wheat.
51	Meal, corn.
52	Flour and meal, edible, n. o. s., except cassava flour, sago flour, and tapioca flour.
61	Mill products, n. o. s., except alfalfa meal.
70	Hay and alfalfa.
71	Straw.
90	Cotton in bales, any quantity.
91	Cotton linters, noils, and regins.
100	Cottonseed.
120	Apples, fresh.
122	Berries, fresh.
124	Grapes, fresh.

List A—Continued

On commodities, in carloads, except as otherwise noted, included under the following descriptions there shall be no increase:

No.	Description
125	Peaches, fresh.
127	Fruits, fresh, domestic, n. o. s.
130	Potatoes, other than sweet.
150	Beans and peas, dried.
162	Flaxseed.
163	Sugar beets.
164	(1)Products of agriculture, n. o. s., as follows: Corn cobs; corn-cob meal; corn husks or shucks; corn stalks; flaxseed hulls.
170	Horses, mules, ponies, and asses.
180	Cattle and calves, single deck.
181	Calves, double deck.
190	Sheep and goats, single deck.
191	Sheep and goats, double deck.
200	Hogs, single deck.
201	Hogs, double deck.
400	Logs.
402	Wood (fuel).
410	Ties, railroad.
443	(1)Excelsior (wood), wood shavings, n. o. i. b. n., and sawdust.
701	(1)Cotton waste, other than manufactured packing or wiping waste.

List B

On commodities, in carloads, included under the following numbered descriptions there may be an increase of 6 cents per ton of 2,000 pounds:

No.	Description
290	Anthracite coal.
300	Bituminous coal.
310	Coke.
320	Iron ore.
330	Copper ore and concentrates.
331	Lead ore and concentrates.
332	Zinc ore and concentrates.
333	Ores and concentrates, n. o. s.
350	Gravel and sand (other than glass or molding).
351	Stone, broken, ground, or crushed; coated sand; and coated rock road-building material.
392	(1)Products of mines, n. o. s., as follows: Borate rock. Bituminous rock. Bituminous asphalt rock. Iron pyrites. Limestone, crushed or ground. Dolomite. Earth or soil, n. o. i. b. n. Feldspar. Fluorspar. Fluxing stone. Ganister rock.

[fol. 213]

No.	Description
392	(1)Products of mines, n. o. s., as follows—Continued. Glass sand. Crude gypsum. Loam. Molding sand. Nickel matte. Ore residue.

LIST B—Continued

On commodities, in carloads, included under the following numbered descriptions there may be an increase of 6 cents per ton of 2,000 pounds:

No.	Description
	Slate, crushed, ground, or scrap.
	Volcanic ash.
420	Pulpwood.
491	(1)Mill cinder and mill scale, iron or steel.
692	Furnace slag.
701	(1)Pyrites cinder, refuse, or dross.
701	(1)Coal ashes and cinders.
701	(1)Brickbats and brick dust.

LIST C

On commodities, in carloads, included under the following numbered descriptions there may be an increase of 12 cents per ton of 2,000 pounds:

No.	Description
352	Stone, rough, n. o. s.
390	Phosphate rock, crude (ground or not ground).
391	Sulphur (brimstone).
392	(1)Products of mines, n. o. s. as follows:
	Bentonite.
	China clay.
	Ground flint.
	Fire clay.
	Gilsonite.
	Ground gypsum, not calcined.
	Kaolin.
	Barium sulphate, ground (barytes), not precipitated.
	Barium sulphate, ground (barytes), precipitated (blanc fixe).
	Magnesium sulphate, crude, or kieserite.
	Mica scrap or screenings.
	Pipe clay.
	Shale.
	Slate, not crushed, ground or scrap.
	Soapstone (talc) ground, dust, lump or rough slabs.
	Chalk, crude.
	Clay, n. o. i. b. n.
	Cobblestones.
	Flint pebbles.
	Marble chips.
401	Posts, poles, and piling.
430	Lumber (made of domestic or Canadian wood or Mexican pine only).
430	Lath and shingles.
431	Box, crate, and cooperage materials.
432	Veneer and built-up wood, made wholly of domestic or Canadian wood or Mexican pine.
443	(1)Products of forests, n. o. s., as follows:
	Acid wood.
	Barks—
	Black oak (stick).
	Cedar, shredded.
	Hickory, not ground or powdered.
	Redwood, shredded.
	Tanbark—Leaf (stick); Ground, spent or not spent.
	Wood-charcoal briquettes.
	Brush, riprapping.
	Charcoal, wood.
	Chemical wood.
	Chips (shavings), brewers' or vinegar.
	Cigar-box wood.

LIST C—Continued

On commodities, in carloads, included under the following numbered descriptions there may be an increase of 12 cents per ton of 2,000 pounds:

No.	Description
	Cones, fir or pine.
	Cork dust (cork-bark refuse).
	Cork chips, shavings, virgin bark, waste, or refuge.
	Palm kernels.
	Pine needles.
	Shingle tow or shavings.
490	Pig iron.
693	Scrap iron and scrap steel.

[fol. 214] LIST D

On commodities, in carloads, except as otherwise noted, included under the following numbered and unnumbered descriptions there may be an increase of 1 cent per 100 pounds:

No.	Description
80	Tobacco leaf, unmanufactured, any quantity.
101	Cottonseed meal and cake.
110	Oranges and grapefruit.
111	Lemons, limes, and citrus fruits, n. o. s.
123	Cantaloupes and melons, n. o. s.
126	Watermelons.
140	Cabbage.
141	Onions.
142	Tomatoes.
143	Vegetables, fresh, n. o. s.
151	Fruits, dried or evaporated.
152	Vegetables, dried, n. o. s.
160	Vegetable-oil cake and meal, except cottonseed.
161	(1) Peanuts, raw.
164	(1) Products of agriculture, n. o. s., as follows:
	Alfalfa seed.
	Apple waste.
	Apricot kernels.
	Bagasse.
	Barley or grain skimmings, malthouse.
	Barley sprouts.
	Bean meal (ground beans), n. o. i. b. n.
	Beans, soya.
	Beet pulp or residue.
	Broomcorn.
	Cane seed.
	Chufas.
	Clover seed.
	Cocoa-bean refuse (cocoa dust)
	Copra.
	Cowpeas.
	Cucumbers in tank cars.
	Fenugreek seed or meal.
	Fodder, n. o. i. b. n.
	Fruit pits or stones, n. o. i. b. n.
	Fruit peel, not candied or crystallized.
	Fruit pulp.
	Grains, spent, dry or wet.
	Grass seed.
	Hemp stalks.
	Kapok seed or kapok-seed meal.
	Malt, malted grain or malt sprouts.

LIST D—Continued

On commodities, in carloads, except as otherwise noted, included under the following numbered and unnumbered descriptions there may be an increase of 1 cent per 100 pounds:

No.		Description
		Meal, alfalfa, clover, peanut vine, or sorghum; or chopped alfalfa
		Millet seed.
		Mustard seed.
		Pea meal.
		Peanut grits.
		Peanut hulls or chaff.
		Pomace, n. o. i. b. n.
		Rape seed or rape-seed meal.
		Sorghum seed or meal.
		Tobacco stems, ground or unground.
		Tomato refuse (from canneries).
		Unmanufactured tobacco cuttings, siftings, scraps, or sweepings.
		Velvet beans or velvet-bean meal.
353		Stone, finished, n. o. s.
360		Petroleum, crude.
370		Asphalt (natural, by-product, or petroleum).
440		Rosin.
441		Turpentine.
443	(1)	Pine tar.
450		Petroleum oils, refined, and all other gasolines.
451		Fuel, road, and petroleum residual oils, n. o. s.
452		Lubricating oils and greases.
453		Petroleum products, n. o. s.
540		Cement, natural or Portland (building).
550		Brick, common.
551		Brick, n. o. s., and building tile.
552		Artificial stone, n. o. s.
560		Lime, common (quick or slacked).
630		Ice.
640		Fertilizers, n. o. s.
697		Building woodwork (millwork).
701	(1)	Soapstone forms or slabs, including fire box or furnace linings.
701	(1)	Tar, and pitch, except brewers' and montan.
701	(1)	Feed, animal or poultry, n. o. i. b. n., and not including biscuits, dog (dog cakes).

[fol. 215] On all other commodities, including all less-than-carload freight, there may be an increase of 2 cents per 100 pounds.

The increases set forth above are subject to the following provisos:

1. In no event shall the increase levied on any shipment be in excess of 10 per cent of the charges which would be assessed in the absence of the increase.

2. Where rates are stated in schedules in dollars per car the respective increases shall be $7.50 per car if the increase, as shown above, is 1 cent per 100 pounds; $10 per car if such increase is 2 cents per 100 pounds; $3 per car if such increase is 6 cents per ton; and $5 per car if such increase is 12 cents per ton.

3. Shipments of petroleum products and furniture moving under rates the same as or less than those prescribed or approved in No. 17000, Parts 4, 4-A, and 5, shall not be subject to any surcharge under these findings, on and after the dates when the rates covered by said findings become effective. When shipments of such commodities move under combination rates all factors of which are not filed in compliance with the decisions in No. 17000, the above authorized increases will apply to the through movement.

4. Where through shipments move under combination rates subject to the interstate commerce act, but one increase may be applied on such shipments. This proviso does not apply where there are two movements subject to the act separated by an intermediate movement not subject to the act. Where shipments move under transit on a basis which applies a through rate (either with or without a transit or out-of-line charge) the increase or surcharge should be applied but once.

Where the minimum weights are different in connection with the separate factors in combination through rates, the increase shall be based on the highest minimum, unless a lower total results from applying the above authorized increases separately to each factor or any aggregation of factors, subject to the minimums attaching thereto.

Weights.—The increases authorized shall apply to the weights on which the charges are based.

Mixed carloads.—Mixed carload shipments shall be subject to the highest surcharge provided for any article in the carload, except where a lower total results by surcharging a portion of the shipment as less than a carload and the remainder as a carload.

Switching, floatage, and lighterage charges.—All switching, floatage, and lighterage charges collected from shippers or receivers may be increased 10 per cent, subject to the following exceptions: (a) in the case of switching charges in the Chicago switching district (Illinois-Indiana) such charges, on and after the date when the rates covered by the order in No. 19610 become effective, shall not exceed the maxima therein prescribed; and (b) no increase shall apply on articles in list A.

Joint rates to and from foreign countries.—It is not intended to increase the proportions of joint through rates to or from points in foreign countries accruing for the trans-

portation in such foreign countries; the proportions of such rates accruing within the United States may be increased to the extent herein approved for domestic rates.

Carriers by water.—Where rates of water carriers are subject to the act, covering transportation either wholly by water or partly by water and partly by railroad, the increases herein suggested may in like manner be applied to such rates.

[fol. 216] Fourth-section departures.—If the adoption of the different rates of increase herein suggested results in any violation of the aggregate-of-intermediates or long-and-short-haul provision of section 4 (1) of the act, the carriers should take prompt steps to remove the violation or promptly make applications for relief.

Rates prescribed and not yet effective.—It is contemplated that the increases herein set forth will be superimposed upon the rates now in effect, whether established by order of the commission or the voluntary act of the carriers (including rates held in effect by reason of investigation and suspension orders), and also upon rates prescribed by outstanding orders of the commission not yet in effect, when and as the rates therein prescribed become effective, subject to the exceptions noted above.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 217] Exhibit No. 3 to Answer of I. C. C.

18440

Interstate Commerce Commission

Fifteen Per Cent Case, 1931

Ex Parte 103

In the Matter of Increases in Freight Rates and Charges

Submitted February 17, 1933. Decided March 7, 1933

1. Upon further hearing, surcharges originally authorized in this proceeding permitted to be continued until and including September 30, 1933, except (1) that the sur-

charge on nonferrous ores and concentrates, and (2) more than one surcharge of 6 cents per ton in connection with the transportation of lake-cargo coal from the originating mine to the ultimate destination, may not be continued after March 31, 1933.

2. The opinion expressed that it would be advantageous for respondents to continue the present loaning plan for the limited period during which the surcharges are to be continued.

3. Previous reports 178 I. C. C. 539 and 179 I. C. C. 215.

Henry J. Hart, William A. Northcutt, M. G. Roberts, C. L. Taylor, Alfred P. Thom, Toll R. Ware, and Charles R. Webber for respondents.

John E. Benton for National Association of Railroad and Utilities Commissioners and Board of Railroad Commissioners of Iowa; George H. Shafer for Illinois Commerce Commission; Fay Harding, C. W. McDonnell, Ben C. Larkin, E. M. Hendricks, and F. P. Aughnay for Board of Railroad Commissioners of State of North Dakota; E. E. Corfman for Public Utilities Commission of Utah; and Herman L. Bode and D. L. Kelley for State of South Dakota.

V. P. Ahearn, M. S. Allison, Michael J. Amuta, J. C. Argetsinger, Arthur B. Ayers, J. D. Battle, John E. Benton, A. J. Bien, A. S. Boden, George J. Bolender, E. S. Briggs, Frederick E. Brown, W. P. Buffington, Johnston B. Campbell, H. W. Chapman, Ira C. Cochran, Willis Compton, J. W. Cone, C. S. Connolly, Willis Crane, W. S. Creighton, Carl R. Cunningham, W. H. Day, R. J. Dellinger, John R. Doolin, R. A. Ellison, Charles E. Elmquist, George E. Farrand, A. H. Ferguson, W. H. Fenquay, R. M. Field, H. M. Fisher, Norris W. Ford, R. C. Fulbright, A. B. Hamilton, James W. Harnach, J. B. Harris, C. E. Hochstedler, John V. Hoey, H. E. Howell, C. B. Huntress, R. G. Hyett, Walter A. Jones, Wesley E. Keller, N. H. Kendall, A. G. Kingsley, B. J. Klein, C. A. Lahey, Wilbur La Roe, jr., A. G. Linne- [fol. 218] mann, Karl D. Loos, Milton H. Love, C. E. McDaniel, J. V. McMahon, E. J. McVann, A. G. T. Moore, William A. Moore, C. A. New, C. H. Nold, George R. Nuzum, Walter G. Patton, Bert L. Penn, J. D. Pierce, A. B. Pratt, H. W. Prickett, J. Curtis Robinson, J. T. Ryan, J. J.

Schmicher, R. Steinacker, P. C. Steinel, P. P. Steury, G. V. Thompson, J. S. Thompson, W. J. Tompkins, Frank B. Townsend, J. R. Van Arnum, Frederick M. Varah, T. G. Walton, Warren N. Watson, A. D. Whittemore, Charles L. Whittemore, N. E. Williams, E. E. Williamson, Walker Wilson, Alpheus Winter, and Wm. Whitfield Woods for others.

Second Supplemental Report of the Commission on Further Hearing

By the COMMISSION:

The previous reports in this proceeding are at 178 I. C. C. 539 and 179 I. C. C. 215. The history of the proceeding is set forth in Increases in Intrastate Freight Rates, 186 I. C. C. 615, and need not be repeated here. It is sufficient to say that we permitted the respondents to file blanket tariffs effective on short notice making increases, commonly called surcharges, ranging from 6 cents per ton to 2 cents per 100 pounds on traffic generally throughout the country. Some commodities, largely agricultural products, were excluded. The surcharges became effective on January 4, 1932, and are to expire on March 31, 1933.

In accordance with a plan proposed by the respondents, and in reliance upon the execution of which we permitted the surcharges to become effective, the revenue accruing therefrom is paid to the Railroad Credit Corporation, an agency specially constituted for the purpose, to be used for making loans to carriers which failed to earn their fixed charges.

By petition dated December 10, 1932, the Association of Railway Executives requested:

> special permission to the carriers to file a blanket tariff, and appropriate tariffs to carry the same into effect, continuing the rates in question after March 31, 1933, the time now limited, in the absence of further action by the Commission, for the expiration of the rates in question; with relief, if necessary, from the statutory requirements as to notice, and without any requirement that any part of the revenues derived from said rates shall be paid over by the carrier receiving them for the use or benefit of any other carrier; and that said tariffs may be permitted to become effective without suspension.

In response to this petition the proceeding was, by order of December 17, 1932, reopened for further hearing upon the following points:

[fol. 219] (1) Shall the surcharges at present in effect under the previous findings herein, be permitted to be continued by filing, upon short notice, tariffs similar in character to those by which they were originally made effective?

(2) If such surcharges are continued, during what period shall they be permitted to remain in effect?

(3) Shall permission to continue such surcharges, if granted, be without condition as to disposition of the revenue accruing therefrom?

The reopened proceeding, like the original one, is being conducted under the cooperative plan, the State commissions being represented by a committee of State commissioners.

It was provided in the order reopening the proceeding that any carrier which did not concur in whole or in part in the petition of the Association of Railway Executives should inform us of its position. In responses to this portion of the order we were advised on behalf of the Toledo, Peoria & Western Railroad that it was opposed to an interpretation of the petition which would recognize the propriety of a distinction as to the disposition of revenue derived from the surcharges in accordance with the earning capacity of the individual carrier. The American Short Line Railroad Association filed a statement of the views of its individual members. Of 140 member lines reporting, 99 endorsed the petition in its entirety; 4 endorsed it with certain reservations; 27 opposed it, and 10 indicated that it was immaterial to them whether or not the surcharges were continued.

Interested parties were given the option of presenting their evidence orally or by verified statement. Some 65 or 70 individuals, firms, organizations and State commissions availed themselves of the opportunity to file verified statements, which statements were incorporated into the record. Certain shippers interested in the application of the surcharges to various cereal products and by-products, animal and poultry feeds, and oil cakes and meals, and in the so-called double surcharge on lake-cargo coal, requested a

hearing. These interests and the respondents were heard orally. In addition, numerous letters and informal statements, unsupported by affidavit, were received, some of which favored granting the respondent's petition but most of which protested against the surcharges in whole or in part, or against various provisions in connection with the application thereof.

The serious financial position of the carriers, reflected in a progressive decline in traffic and revenues, gross and net, since 1929, is shown of record and is of common knowledge. Taking the average of the corresponding periods of the five years, 1925-1929, as a basis for comparison, the freight carloadings of Class I carriers in the first four weeks of 1932 reflected a decline of 37 per cent and thereafter there was a progressive fall to approximately 52 per cent below the base period for the five weeks ending in July. Since that time there has been a slight recovery, but the level of freight traffic in December had not been restored to as high a plane as prevailed in January, 1932. [fol. 220]

The operating revenues of Class I carriers were over two billion dollars less in 1931 than in 1929, and, on the basis of the first 10 months, it was estimated by the witness that the revenues of 1932 would be over three billion dollars less than in 1929. This estimate is verified by figures which have since become available showing that the 1932 revenues were $3,191,000,000 less than in 1929.

The total operating expenses, which amounted to 4.5 billion dollars in 1929, were estimated by the witness, on the basis of the first 10 months, at about 2.4 billions for the year 1932, a decline of 2.1 billions under the expenses of 1929. The operating ratio was 71.76 in 1929, 74.43 in 1930, 76.97 in 1931, and 77.10 in the first 10 months of 1932, the last ratio having been held down in part by the 10 per cent wage reduction effective with February 1, 1932. Railway tax accruals fell from $396,682,638 in 1929 to $303,528,099 in 1931, and, on the basis of the first 10 months, they may be estimated at $289,565,038 for 1932, a decline of $107,117,600 under the accruals of 1929. This decline is largely accounted for by the fact that the taxes are in part based on income, especially the Federal part.

The rate of return on the recorded property investment of Class I carriers (excluding switching and terminal com-

panies) fell from 4.81 per cent in 1929 to 3.27 in 1930, 1.99 in 1931, and for 10 months of 1932, 1.15 per cent. If in place of the recorded property investment there be substituted the value taken by us in Increased Rates, 1920, 58 I. C. C. 220, plus subsequent net additions and betterments, but without consideration of depreciation as affected by the further lapse of time, changes in maintenance standards, and additions of new property, these percentages would be, respectively, 5.22, 3.54, 2.13, and 1.23.

These carriers as a whole earned less than the amount of their interest, rentals, and other deductions from gross income in 1932, the deficiency having amounted to nearly $169,000,000 for the first three quarters of the year, notwithstanding the surcharges and the decrease in wages which became effective in 1932. In these nine months 128 of Class I railways or systems operating 82.9 per cent of the total mileage, reported a deficit after interests, rentals, and other deductions, and their aggregate deficit was $265,018,869 if the revenue from the surcharges is excluded, or a deficit of $231,509,091 for 122 roads, operating 77.6 per cent of the mileage, if the revenue from the surcharges is included:

[fol. 221] The receipts by Class I carriers (including switching and terminal companies) from the surcharges amounted to $53,790,306 for the first 10 months of 1932, as shown below:

10 months of 1932	Freight	Switching, floatage, and lighterage	Total surcharge
Eastern district, including Pocahontas region	$31,196,719	$529,662	$31,726,381
Southern region	6,271,646	60,567	6,332,213
Western district	15,429,369	302,343	15,731,712
United States	52,897,734	892,572	53,790,306

This aggregate was 2.6 per cent of the freight revenue of these carriers for the 10 months, and it was 20.2 per cent of the net railway operating income. The corresponding figures by districts were:

10 months of 1932	Eastern district, including Pocahontas region	Southern region	Western district
Revenue from emergency rates:			
Per cent of operating revenues	3.1	2.4	2.0
Per cent of net railway operating income	17.7	36.9	22.5

Figures are now available for the calendar year 1932 which show that the receipts from the surcharges amounted to $62,663,882, credited to freight revenue, and $1,066,917 for switching, floatage, and lighterage. These two sums together amounted to 2.6 per cent of the freight revenue and 19.1 per cent of the net railway operating income.

These percentages are based on a comparison of the reported surcharge with the reported revenue and income. They do not represent what the weighted-average per cent of increase in rates would have been if the volume of traffic actually carried had moved at the rates in effect in 1931 plus the surcharges without the many reductions made to meet competition. But such a refinement would probably be of little value.

Respondents' officials expressed the opinion that the surcharges had not seriously interfered with the free flow of traffic, that they had resulted in a net increase in revenue, and that the addition thereof to the basic rates resulted in reasonable rates. No attempt was made to state the total amount of the net increase in revenue and it is apparent that any estimate thereof must be largely speculative because there are too many uncertain elements which enter into the calculation. The receipts by the Railroad Credit Corporation can not correctly picture the situation because they include the surcharges on basic rates which have been reduced below the former level, for competitive and other [fol. 222] reasons, and they take no account of revenue lost entirely to the rail carriers by reason of the diversion of traffic to competing transportation agencies, or for other reasons.

The evidence on behalf of respondents which has a bearing upon the question as to the period during which the surcharges, if continued, shall be permitted to remain in effect consisted of statements to the effect that the surcharges have become welded or assimilated into the general rate structure and that business and traffic conditions have become adjusted to them. It is contended that, as the termination of the emergency can not be foretold, the emergency surcharges should be continued without limitation.

With respect to disposition of the surcharge revenue, respondents point out that any assumption indulged in at the time the Railroad Credit Corporation plan was devised that numerous roads would have a surplus over and above their

fixed charges which should be made available to other roads in less fortunate circumstances, has been dissipated by subsequent developments. As above indicated, there was a widespread failure among the carriers to earn their fixed charges in 1932, and if only those carriers which are earning their fixed charges were called upon to make available their surcharge revenue over and above the portion thereof necessary to bring their own earnings up to the level of their fixed charges, for loans to other carriers, the total of such a fund would be relatively insignificant. In view of these facts, it is contended that there is no justification for the continuance of the loaning plan under which the individual carriers, many of which will not earn their fixed charges, now surender to the Railroad Credit Corporation that portion of their revenue represented by the surcharge.

The predominating basis for opposition to the surcharges is that, as a result of diminished buying power of consumers, depression in agriculture and industry, reduction in the value of commodities, and existing depressed business conditions generally, freight charges have become increasingly burdensome to the extent, it is urged, of decreasing the volume of traffic which otherwise would be offered.[1] Increasing diversion of traffic from the rails to trucks or [fol. 223] other competing transportation agencies was

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[1] Evidence was introduced in support of contentions that the surcharges should be eliminated on all traffic, and also that they should be eliminated or reduced on numerous specified commodities, including lake cargo, coal, lignite coal, lumber, timber, and forest products, dairy products, iron and steel, marble waste, zinc ore and concentrates, stoneware, hardwood lumber, pulp and paper, sand and gravel, clay or shale cinder rosin sizing, phosphate rock, salt cake, textiles, anthracite and bituminous coal and coke, copper, citrus fruits, walnut logs and lumber, petroleum and products, products of meat-packing industry, cabbage, fruits and vegetables, clay products, liquid caustic soda, pulpwood, news-print paper, crude fire clay, cotton piece goods, cottonseed and products, agricultural lime, and numerous cereal products and by-products, oil cakes and meals, and prepared animal and poultry feeds. It is impracticable in this report to discuss this evidence in detail but it has been given careful consideration.

shown. Competition with articles which reach the markets without rail transportation is stressed by various parties including, for instance, the coal interests, whose product competes with gas and oil moving through pipe lines, and hydroelectric power, and the lumber interests which encounter competition with substitutes at or near points of consumption. Competition of domestic products with those imported from foreign countries is also referred to, particularly in the case of phosphate rock and salt cake. Various industries, such as the textile and newsprint, contend that they are unduly penalized by the imposition of surcharges on both their inbound raw materials and their outbound finished products. Shippers and consumers of lake-cargo coal strenuously object to the payment of one 6-cent per ton surcharge on the rail movement from the mines to the lower lake ports and another surcharge of 3 cents per ton in some instances and 6 cents per ton in others, on the rail movement from the upper lake ports to destinations. Certain shippers of nonferrous ores and concentrates in interstate commerce object to the continuance of the surcharge on their traffic while it does not attach to the traffic of their competitors moving intrastate. In addition to objections above outlined, which go generally to the imposition of the surcharge *per se*, numerous objections were made to the application of surcharges to certain commodities and not to competing commodities of a more or less similar character. A typical illustration is prepared animal and poultry feeds and various oil cakes and meals used for feed purposes, which take a surcharge of 1 cent per 100 pounds, whereas grain, and feeds made wholly from grain, take no surcharge.

With respect to the so-called double increase on lake-cargo coal we said in the supplemental report in this proceeding:

> Objection has been raised to the imposition of the so-called double increase where there are movements subject to the act separated by an intermediate movement not subject to the act. This applied particularly to movements of ore and coal through lake and ocean ports. There are practical difficulties in the way of accomplishing this by general provisions such as are made in this report. Therefore shippers and carriers are left free to endeavor to work out this situation between themselves.

The State commissions of Michigan and Wisconsin authorized a surcharge of 3 cents per ton for the intrastate transportation of dock coal, and for competitive reasons, this restriction has been given certain interstate application. Generally speaking, however, the full surcharge of 6 cents per ton has been applied on dock coal moving interstate notwithstanding that a similar surcharge has already been collected on the same coal in connection with the movement from the mines to the lower lake ports. In a some- [fol. 224] what similar situation coal moving by rail to Virginia ports, ocean to New England ports, and rail to interior New England destinations has been assessed only one surcharge.

The lines serving the upper lake docks insist that the full surcharge has properly been assessed on the separate and independent movement of this coal from the docks. A representative of lines serving the coal fields of Illinois and Indiana and western Kentucky testified that in view of the relation between the coal rates from this territory and from the lake docks to the Northwest those lines were very apprehensive that any reduction in the surcharge from the docks would, for competitive reasons, have to be met in the all-rail rates from the Illinois, Indiana, and Kentucky fields, which would entail serious loss of revenue on the approximately 25,000,000 tons moving from those States to the Northwest. The fact is, however, that, considering the transportation charges as a whole on the lake-cargo coal, and on the Illinois, Indiana, and Kentucky coal to the Northwest, the relation between the two existing prior to the effective date of the surcharge was altered as a result of the method of applying them, to the extent of placing the former at a disadvantage of 3 or 6 cents per ton as compared with the latter.

In Increases in Intrastate Freight Rates, supra, we did not find sufficient justification for requiring the application of the surcharge in connection with the intrastate transportation of nonferrous ores and concentrates in certain western States which declined to permit the authorized surcharges to become effective. We stated in that report:

> It is assumed that the carriers will withdraw any surcharges which they may now levy on traffic in ores and concentrates moving interstate, or intrastate in other States.

These interstate surcharges have not, however, been withdrawn.

The shippers, generally speaking, evinced little interest in the manner of disposition of the surcharge revenue but many of them, including some who do not oppose continuation of the surcharges, took exception to respondents' contention that they have become an integral part of the rate fabric. It is insisted that, if an extension is permitted, the surcharges should be separately published as at present and should be effective only for a specified and limited period. Suggestions as to the length of that period range from six months to one year.

In the supplemental report in this proceeding we briefly and pointedly stated the nature of the increases authorized in our original report and the controlling reason for our action in authorizing such increases. We there stated:

[fol. 225] However, we further found that these increases were justified only as a temporary, emergency measure, and primarily and principally to assist some of the carriers in connection with the payment of their fixed charges. We therefore stated that the increases, in the absence of action to the contrary taken by us, should expire on March 31, 1933, and that meanwhile the income therefrom should be kept separate from other operating income of the carriers, placed in a pool, and used in connection with the payment of fixed charges and for other purposes as described in our original report.

Although, because of our desire to avoid delays, which, we felt, would at that time have been injurious to the general public, including the carriers, and in reliance upon the carriers applying the funds derived from the authorized surcharges in aid of financially weak railroads in accordance with the purpose expressed in our original report, we modified our original report to the extent of relieving the carriers from the necessity of complying with the pooling plan therein described, we in nowise changed the temporary emergency nature of the increases or our expressed opinion as to the purpose to which the revenue derived therefrom should be devoted.

Economic conditions have grown progressively worse since the surcharge plan was authorized. The price level of practically all commodities has continued to fall. The

abnormal relation of freight rates, as a whole, to the general level of commodity prices is, therefore, now much more pronounced. The carriers in many instances have found it impossible, due to the above-described conditions and the resulting increased competition with other agencies of transportation, to maintain the rates and surcharges as originally established. In some cases the surcharges were removed, and in others, although the surcharges as such were retained, the basic rates were reduced sufficiently so that when the surcharges were added to them the total was equal to or less than the former basic rates. In both cases the surcharges have, therefore, as a practical matter, disappeared. The extent to which such reductions have occurred can not be accurately determined upon this record but it appears to have been considerable.

The anticipation, when the surcharges were originally authorized, that the number of railroads which would fail to earn their fixed charges would be greatly exceeded by those which did was not realized. Instead, 128 Class I carriers operating approximately 83 per cent of the total mileage did not earn fixed charges in 1932, without the surcharges. This condition resulted from the unprecedented decline in railroad freight traffic since 1931. The revenue turned over to the Railroad Credit Corporation fell far short of expectations based upon 1931 traffic, and that institution, although helpful, turned out to be a minor and the Reconstruction Finance Corporation the major prop to railroad finances.

[fol. 226] It is evident that the surcharge plan, as a temporary emergency measure, although productive of some net increase in revenue, falls far short of solving the problem of credit now confronting the railroads generally. Continuance of the surcharges without limitation or condition would be equivalent to a general increase in freight rates. This clearly is not justified upon the present record. The problems with which the railroads are confronted to-day can not be solved by general increases in freight rates. Certainly any substantial increase would result in permanent injury to the railroads. Their low earnings are not the result of low rates. The present relation between commodity prices and freight rates was discussed upon the record to some extent, but that general question will be presented in another proceeding at an early date and can not be determined here.

In our original report herein, under the heading of "The Railroad Future," we discussed certain matters of utmost importance to the future of the railroads. We wish to again emphasize the recommendations which we there made.

Giving due weight to all the surrounding circumstances and conditions, and to the evidence presented in this record, as reopened, we are of opinion that the surcharges, as such, should be brought to an end, but that a reasonable period should be allowed during which the respondents will have an opportunity to file tariffs in the usual way proposing such readjustments in their rates, in the light of the impending discontinuance of the surcharges, as they feel they can justify. We will, therefore, permit blanket tariffs to become effective on short notice without suspension, continuing in effect until and including September 30, 1933, the present surcharges, as such, except that there shall be no surcharges on nonferrous ores and concentrates and only one surcharge of 6 cents per ton in connection with the transportation of lake-cargo coal from the originating mine to the ultimate destination.

In the supplemental report it was pointed out that respondents' loaning plan would not be pooling within the meaning of that term as used in section 5. (1) of the act, and that loans by and between common carriers, as such, have not been included within the jurisdiction conferred upon us. The majority was of the opinion that we were without power to require, in the manner described in our original report, the pooling of the revenue to be obtained from the surcharges. We relied, however, on the respondents to apply the fund to be derived from the surcharges for the purpose expressed in our original report. We are of the opinion that it would be advantageous for respondents to continue the present loaning plan for the limited period during which they are here authorized to continue the surcharges.

[fol. 227] In this general proceeding, dealing with the broad subject of whether or not the surcharges as a whole shall be continued, it is impracticable in the time available to go into questions relative to the propriety, during the limited time during which the surcharges are here authorized to be continued, of the application of the surcharges on cer-

tain individual commodities and not on others, based on considerations of similarity in character and competitive relations between them, and as to the interpretation of the surcharge tariffs in their application to individual commodities in respect to which there was considerable discussion in the reopened proceeding. The machinery has been provided for considering such questions in all of their aspects and recommending such changes as appear proper, by the designation of a committee of our employees with which a committee of railroad officials works in close cooperation. Matters of the kind designated should, in the first instance, be submitted to these committees, it being understood that parties dissatisfied with the results obtained by such action always have the right to bring the matter in dispute to our attention by formal complaint.

Commissioner Mahaffie concurs in the results.

EASTMAN, Commissioner, dissenting:

The surcharge plan was an extraordinary remedy adopted under extraordinary circumstances for a special purpose. Relying, as I believe, upon their financial advisers rather than upon the practical judgment of their immediate managements, the carriers had proposed a blanket increase in freight rates of 15 per cent, at a time when commodity prices in general had fallen precipitously and were still falling, when the demand for the service of the carriers had fallen in like manner, and when they were faced by new and serious competition from other transportation agencies. After hearing the evidence we decided unanimously that we could not approve such an increase. Time and experience have amply sustained our analysis of the dangers of the proposal and our judgment in refusing to approve it.

Not only did we point out the practical dangers, but in discussing the proposal from the standpoint of the law we also made it clear that revenue needs of the carriers are not paramount and controlling in the determination of reasonable rates. Among the other factors to be considered, we mentioned the value of the service to the shipper, and stated that the "relation of the general level of freight rates to the general level of commodity prices is a factor which can not be disregarded, particularly in a time of general prostration," citing Supreme Court cases to the

[fol. 228] effect that "What the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." Another factor which we mentioned was the "volume of business carried on by the carriers in its relation to what may be deemed normal."

We reached the conclusion that the increase in rates sought "would increase revenues, if at all, only temporarily and that its ultimate effect, not very long postponed, would be to harm rather than help the railroads," and that "such an increase would raise the rates upon many kinds of traffic above a reasonable level."

Rejecting the large, blanket increase proposed, we did permit a small increase in certain rates, but only for a special purpose. It was "motived by the thought that the distrust of railroad securities is rapidly gaining such elements of panic that a slight charge on the traffic of the industries of the country best able to stand it may justifiably be imposed, through freight rates, for the purpose of increasing confidence and averting developments which might further disturb an already tremendously shaken financial situation, and to avoid impairment of transportation." The plan was "offered for the consideration of the railroad executives in the immediate emergency, and only as a temporary measure of relief."

The carriers had stressed the credit situation. We pointed out that the increase which we proposed "would, without further provision for the allocation of the resulting revenues, to a certain degree help the carriers now in need, but would go, in part, to carriers now securing revenues adequate to sustain their credit, and as to which no emergency exists." Therefore a pooling scheme was incorporated in the plan as an essential condition, with the stated purpose to "give reasonable assurance that fixed interest obligations, not now in default, can be protected generally from default." While a majority of the commission abandoned this condition in the supplemental report, it was only because they relied on the carriers "to apply the funds to be derived from the authorized increases in rates in aid of financially weak railroads in accordance with the purposes expressed in our original report."

The plan, in short, was regarded as something apart from our ordinary rate procedure, adapted to an emergency use

for the benefit of all concerned, and to be made effective through such a spirit of cooperation as might reasonably be expected in a time of distress. It was so received by the country.

Since this extraordinary remedy was prescribed for the special purpose which then appeared to be paramount, conditions have changed in at least three important respects:

[fol. 229] 1. The demand for railroad freight service has further decreased to such an extent that it has been found impossible to protect fixed charges through the operation of the surcharge plan. It was necessary to create the Reconstruction Finance Corporation for the further protection of this situation, and now it seems probable that a number of railroads will have to be reorganized. For the future, therefore, the carriers wish to abandon the pooling feature of the surcharge plan which was originally the vital part of it, and to treat the surcharges as ordinary rate increases.

2. Economic conditions, although they were bad enough in 1931, have continued to grow worse, and the level of commodity prices has in general continued to fall. The statement which we made in 1931, therefore, that the "relation of the general level of freight rates to the general level of commodity prices is a factor which which can not be disregarded, particularly in a time of general prostration," has even more force now than then.

3. In an indeterminate, but certainly a very large, number of instances the railroads found it impossible to maintain the rates as increased by the surcharges. Instead of eliminating the surcharge in such instances, however, they very generally retained it and reduced the basic rate. In most, if not all, of these instances the total charge is now less than it was before we added the surcharge. Actually, therefore, the surcharge has been eliminated, although it still exists in form.

The surcharge tariff is a unique and anomalous thing. In order to ascertain the rate for a movement of a commodity to which the surcharge is applied, it is necessary to consult two tariffs, one naming the basic rate and the other the surcharge. The sole excuse for this device was the fact that the surcharge revenue was to be segregated and pooled through

the medium of the Railroad Credit Corporation. This excuse will no longer exist, if the announced intention of the railroad executives to abandon that corporation is carried out, as I presume it will be notwithstanding the expression by the majority of the commission of a hope to the contrary. Nor will any purpose be served under such circumstances, when rates are reduced, by retaining the surcharge as a matter of bookkeeping and pretending it still exists when it has no reality in fact.

The surcharge plan was in the nature of a special tax assessed upon industry for what was believed to be the general good, and which we made it possible to assess through the exercise of our discretion in permitting tariffs to go into effect without suspension. Such exercise of discretion was, I believe, justified as a matter of statesmanship under the extraordinary conditions then existing. The special purpose of the plan, however, has failed and that purpose is to [fol. 230] be altogether abandoned. Moreover, conditions have so changed as to make such a special tax much less justifiable.

The railroads of the country are in desperate financial straits, but they are in such a condition because the other industries and the people of the country generally are in similar or worse straits. When we adopted the surcharge plan, we eliminated most farm products from its application, because of the prostration of agriculture and the very low level to which the prices on such products had fallen. There was no other reason for the elimination. Under the circumstances we concluded that an increase would result in unjust and unreasonable rates, and in a burden which could not "reasonably be borne under present conditions." The instant record shows that this conclusion is now equally applicable to the coal industry, the lumber industry, the citrus fruit industry, and many others.

In the profound economic disturbance which now exists, the railroads have been and are, so far as their rates are concerned, a sheltered industry. I have figures before me which show that in 1931 the average ton-mile revenue was 45.7 per cent higher than in 1913. If adjustments are made for the great increase in average length of haul since 1913 and for the change in proportions of major traffic groups, the level in 1931 may have been as much as 68 per cent higher than in

1913. The figures are not available for 1932, but such reductions in rates as were made in that year were in whole or in part offset by the surcharge increases. Contrast this with the well-known facts as to what has happened in the case of commodity prices generally, with the exception of steel rails, where the price, most unfortunately for the railroads and for the country, has been maintained near the pinnacle by the stubborn will of producers without insight or vision.

This major dislocation between commodity prices and the charges for transportation service may be one of the factors which is impeding the recovery of business, and it can be cured in only two possible ways, either by inflating the prices of commodities or deflating the freight rates. If it is such an obstacle to recovery, this dislocation is doing harm rather than good to the railroads. I shall not discuss this subject further, because it is presented in an important petition which is pending and is shortly to be argued before us, and which I do not wish to prejudice. It is sufficient to say that in the face of these facts I can not join in a continuation of the policy which the surcharge plan reflects of increasing freight rates under present economic conditions. Nor am I convinced that the rates so increased would, in many instances be just and reasonable.

[fol. 231] In expressing this conclusion, however, I desire to say that I have the utmost respect for the views of the majority of the commission who have reached what is, apparently, a different conclusion. In reality there is not, I believe, any fundamental difference in our views. The difference is rather one of judgment as to the procedure which is wise in attaining eventually much the same end.

There is, morever, this further partial justification for the procedure adopted by the majority. Where the basic rate has been reduced for competitive reasons so that the total charge, when the surcharge is added, is less than it was when we approved the surcharge plan, elimination of the surcharge might in many instances produce an unwarranted decrease in carrier revenues. In such instances the carrier ought to have a reasonable opportunity to combine the surcharge with the basic rate by an increase in the latter. In the case of rates which have undergone such competitive reductions, I would be willing to grant such an opportunity,

but I have no present reason to believe that any lengthy period of time would be required.

I am authorized to say that Commissioner McManamy joins in this dissent.

PORTER, Commissioner, dissenting:

The policy of the majority in continuing these surcharges with the thought that it will help the carriers is an iridescent dream. Why we should temporize with these surcharges, as is done here by the majority, is beyond my comprehension. They were authorized only as a temporary measure of relief. They have failed utterly in their purpose. Their continuance is a positive injury to the carriers and shippers alike. Why should we prolong the uncertainty as to their permanence, or add to the chaotic and discriminatory situation caused by their existence?

Let us look briefly to their history. On June 17, 1931, the carriers filed an application asserting that an emergency existed threatening serious impairment of their financial resources and their capacity to assure the public a continuance of efficient and adequate service. They sought authority to make a general increase of 15 per cent in their freight charges. After extended hearings, elaborate briefs, and oral arguments, the commission unanimously denied the request. We did, however, authorize certain increases in the nature of surcharges to be added to the basic rates on certain commodities, on the express condition that the money received therefrom should be segregated from the basic rates and paid into a pool to be used by the companies in meeting deficiencies on interest on their fixed obligations.

[fol. 232] Thereafter, the carriers filed a petition with the commission alleging that the pooling could not be applied, and asking that they be permitted to substitute therefor a loaning plan. They proposed to create an agency into which the money realized from the surcharges should be paid and by which it should be loaned at low rates of interest to the companies in greatest need. A majority of the commission, in a supplementary report, relieved the carriers of the necessity of complying with the pooling plan as proposed by the commission in the first instance, and in effect disclaimed our jurisdiction to require any sort of a pooling plan. From that holding I joined with others in a dissent. The result

was that with the exception of certain agricultural products, a charge of a few cents per ton or per hundred was added to the regular freight rate, which was kept separate and paid into the Railroad Credit Corporation, and by it loaned to certain of the carriers. The increases were limited to expire on March 31, 1933, and the majority propose to continue them to October 1, 1933, without any restrictions whatsoever and permitting the carrier who receives the increases to retain them.

It will be observed that in the first instance, we bravely required a gift from the strong to help the weak in order that we might preserve the credit of a national system of transportation. Then upon the petitions of carriers, we weakened and modified that to permit the strong to loan to the weak. Finally, the majority here march down further and say, "Let the strong have what they can get and let the weak take care of themselves."

No one acquainted with the facts can fail to be sympathetic with the situation that confronts our railroads, but I am abidingly convinced that to continue increased freight rates is not the way to help them or the public which is compelled to bear them, in a time like the one through which we are passing. The scheme continued by the majority has failed wholly of its primary purpose, the sustaining of railroad credit. During 1932, it produced about $66,000,000, while 162 roads operating 242,186 miles for the first nine months of that year, excluding the emergency revenues, had a total deficit of $265,018,869. Up to March 1, 1933, this commission approved for loans by the Reconstruction Finance Corporation to the carriers to the amount of $393,003,783, and applications were pending on the same date asking approval of additional loans amounting to $51,885,029.56. They have exhausted their credit, except as loans are made to them out of the money of the taxpayers of the Nation.

To continue these increases is to fly in the face of an economic trend, world-wide in its character and as irresistible as Niagara. I do not believe the carriers should be permitted to go against this current, however slight the movement [Vol. 233] may be. Commencing in 1920, we have witnessed in this country an almost continual and precipitous decline in commodity prices, until now they are the lowest in our history. While wholesale commodity prices are 17 per cent

below pre-war prices, freight rates are at least 50 per cent above pre-war prices. The gap between the two should, if possible, be lessened rather than increased as the majority desire here. In our original report we said of the 15 per cent increase, "the chief dangers are (1) That at a time when transportation costs are of vital consequence to every industry, it will stimulate any competitive forces already rapidly developing; (2) That it will alienate or impair the friendly feeling toward the railroads on the part of the people of the country which is essential to adequate legislation for their protection and the proper regulation of all forms of transportation in the public interest; and (3) That it will disturb business conditions and an already shell-shocked industry, and accelerate the tendency toward a localization of production." The surcharges here continued, have contributed in a measure to that very thing. At this time, with the ratio of rail rates to commodity prices as it is, they can not fail to cast a burden on the commerce of the country such as greatly to retard its free movement, and in consequence result in actual loss of revenue to the carriers.

The policy pursued here of authorizing these increased rates of the carriers is contrary to that being engaged in at present by every other industry. If there be a single other industry that is raising its prices at this time, it has entirely escaped my attention. We all know they are doing just the opposite. A walk down Main Street of any community and a glance in any store window, or a look at the advertisements of any paper, demonstrates the efforts of business generally to attract sales by the lowering of prices. Why should railroads with nothing to sell but transportation be the only industry immune from such a policy, especially when, as never before, they are haunted by four competitors who are all rapidly gaining in the race? Thanks to the wisdom of the executives in charge of many railroads, as I shall hereinafter show, they are pursuing no such policy of raising rates—only this commission is doing that.

I have just stated that the policy of the majority is contrary to what the carriers themselves are doing. Let us see.

There are in round numbers, over 100,000 tariffs making changes in freight rates, filed with us each year. There are often very many changes in rates in each tariff. It would

be conservative to say of the 101,657 tariffs filed last year, 1932, at least 80 per cent of them provided for reductions in rates voluntarily made by the carriers and not over 20 per cent for increases. These reductions have been made [fol. 234] largely, no doubt, for two reasons. In the first place, they are caused by market and carrier competition. In the second place, by the pressure of the shipper with a large amount of tonnage at his disposal, called in traffic parlance "the big stick". Many notable illustrations might be given.

In No. 17000, Part 6, we fixed maximum reasonable rates in official territory covering the movement of iron and steel articles. Throughout that territory the carriers, while adhering to the surcharge, have made substantial reductions in the basic rate up to 100 miles for application both interstate and intrastate. In Illinois Freight Association territory, while keeping on the surcharge, they have cut the basic rate underneath it on iron and steel back to the Jones and Laughlin scale, which formerly obtained. The big producers of soap in this same territory applied to this commission to reduce the classification given soap, one class, which would have produced a considerable reduction in the freight charges. A lengthy proceeding was held, briefs were filed, and oral arguments were made, and the very day the commission announced its decision refusing to make the reduction, it was advised by letter that the railroads, while maintaining the surcharge, had themselves cut the basic rate in a greater amount than the complainants had requested the commission to do.

There is now on file with this commission a tariff to become effective April 1, 1933, cutting the freight rate on anthracite coal from the Pennsylvania coal fields to Chicago $1 per ton, a big reduction, but leaving on the surcharge of 6 cents per ton. Also, there is pending before the commission for decision a proceeding wherein the carriers in the South are seeking, over the protest of other carriers and the barge lines, to reduce the basic rate on sugar from New Orleans to Chicago from 54 cents to 28 cents per 100 pounds, or 26 cents, while the surcharge is but 2 cents per 100. There are literally thousands of instances like the four foregoing, where, as a matter of fact, the carriers have cut the rate in an amount equal to or greatly more than the surcharge, so that the continuance of the sur-

charge becomes a mere matter of bookkeeping. The point, among others, I am endeavoring to drive home by this is, that the "forgotten man" on Main Street, not within the range of competitive forces and wielding no "big stick" over the carriers, will, by the command of the majority, be compelled to pay the same old rate he has been paying and, in addition, the surcharge.

Not only have the carriers been unable to maintain their level of rates of a year ago, plus the surcharge, but the situation of intrastate rates is far from a happy one. Several of the States have refused point blank to put in any of these extra rates for intrastate application within their States, and are fighting their going in, in the courts. A [fol. 235] large number of States have exempted a portion of their traffic from their burden, particularly in instances where it was a commodity of great concern to the State and moving in large volume in the particular State. There are very few States where they have been allowed to be applied on all traffic intrastate. While this is the hodge podge situation at the present, we have every reason to believe that it will become very much worse, for the reason that not a single State commission has advised us that they favor the continuance of these surcharges, but, on the contrary, almost all of them are actively opposed to it. It is extremely doubtful if a half dozen of the States will authorize the carriers to put them in again intrastate after March 31, 1933.

In addition to the discriminations now caused by the action of the various States and in all probability to be greatly increased after March 31, are those existing between products. There are many products of kindred character, some of which are subject to the surcharge and some of which are exempt, that are in active competition with one another. This is especially true of various grain products. There is active competition between various forms of fruits and vegetables for public favor. On some of these an extra charge is imposed and on others not, thereby giving in times like the present, a decided advantage in the markets to the one upon which no such burden is imposed.

Coal is the largest single item of tonnage for the railroads. In the year, 1931, the product of mines comprised 49.11 per cent of the total tonnage of freight carried by all

of our Class I steam railways. A large part of these products were constituted of anthracite and bituminous coal. The amount received from the surcharge on coal constituted more than one-fifth of the entire amount received from all surcharges assessed. Very few of the railroads but carry some coal, and for many it furnishes from 25 to as high as 87 per cent of their total tonnage. A very large proportion of the coal rates have been fixed by this commission as maximum reasonable rates, and to those rates are continued these superimposed charges of 6 cents per ton, a figure apparently small but sufficient to turn many a contract and which, as has been stated, furnishes a very considerable proportion of the entire amount rereived from such extra charges. The most prosperous carriers in the United States are the three carriers known as the Pocahontas carriers. Their tonnage is largely made up of coal. Next to these carriers in their present earnings, with rare exceptions, are the large coal-carrying roads of official territory. Under the plan here proposed they will be permitted, though among the less needy, to retain for themselves this extra charge. This also in the face of the fact that those engaged in the business strenuously [fol. 236] maintain that by these high freight rates the carriers are gradually losing hundreds of thousands of tons of this tonnage and many thousands of dollars in freight revenue.

In a refusal to continue these surcharges, the strong carriers that are now insisting on a retention of the earnings derived therefrom would not in fact be losing anything. They have not been receiving them, but no matter what reductions they have been compelled to make in the basic charge, have been turning them over to the credit corporation for loaning to the weaker railroad. They, therefore, can not be injured by the failure to longer continue the surcharge. In fact by their continuance they are receiving for the first time an increase in freight rates from those persons and commodities unable to help themselves. With the thousands of reductions which have been made in the basic rates, it is impossible to even estimate whether the carriers as a whole have reaped a single penny's advantage by these extra charges.

The present railroad distress is undoubtedly due to the same conditions that affect every other industry—the lack

of business. With a slight increase in the volume of traffic moving, wonders would be worked in this whole railroad situation. We are all hoping for the coming of that better day. But, "generally speaking, it must be recalled that, in railroads—almost alone among sister industries—rates remain at boom time levels. Adjustment to new economic horizons lags. It is hard for us to believe that wholehearted cooperation and vigorous application of co-temporary principles of industrial management and control, within the various railroad companies themselves, along lines just discussed, would not do more than can government or any other outside force to rehabilitate this most important of American industries." So spoke the National Transportation Committee in its recent report.

TATE, Commissioner, dissenting:

I can not approve of the continuation of the increases (which have been referred to and which will hereinafter be referred to as "surcharges") beyond March 31, 1933; hence I must dissent from the report of the majority which grants a six months' extension.

I did not believe the additions, by whatever name they might be called, ought to have been granted when they were first granted, and I cast the one dissenting vote, though contenting myself with merely recording my dissent in the report, without a separate expression. I believe I was right then, and that, in view of the economic condition of the various industries the products of which are made to bear the surcharge, I am on still firmer ground in not agreeing to a continuation of these surcharges. The commission had in many cases, and has since in many other [fol. 237] cases, said what would be reasonable maximum rates. If these findings were correct, then the addition of any amount, by whatever name called, would make unreasonable rates. I think it is almost axiomatic or, at least, that it must logically follow, that if the commission was in error in putting in the surcharges, the mere fact that they had been in could not constitute a legal ground for continuing the surcharges and thus prolonging and projecting the error, even though, confessedly, at least some inconvenience might arise to the carriers in readjusting their basic rates by reason of the denial of these surcharges. Paragraph (7) of section 15 of the interstate

commerce act provides that "At any hearing involving * * * a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, was just and reasonable shall be upon the carrier, * * *." I have never believed that there was such a record upon which the increases were allowed as could be said to be such a record as would meet the requirement that the carriers shall assume and carry said burden. On the contrary, I am of the opinion that the record demonstrates by the preponderance of testimony that the various industries, the products of which were made subject to the surcharge, were in such condition as that they could not stand the surcharge without grave injury and that a proper consideration of the relationship of the value of the service rendered to the charge made would not permit these additions. I can not see how the use of some magical or cabalistic word, such as "surcharges," took these increased rates, which the shippers would have to pay, out of the plain letter of the law. It seems to me that any increase sought ought to be proposed in a tariff filed in the regular way and be subject to the regular machinery of possible suspension and investigation. However, the surcharges which were applied and which we are asked to allow to continue to be applied were simply allowed by the commission with a statement in advance that they would not suspend and that it would take something in the nature of complaint cases to bring them separately before the commission for adjudication. I respectfully state that it is my view of the law that the burden could not thus be shifted nor the procedure be changed.

The one thing which might be said, at least as a matter of policy (the question of law aside for the moment), to cause the commission to allow the surcharges to be added was the pooling plan voluntarily agreed to by the carriers, which would create a general fund out of which loans could be made, and it was presumed that these would be made where they were most needed, that is, to weak carriers. This one reason which might have appealed as a matter [fol. 238] of policy (the provisions of the law being aside for the moment) has been taken away by the carriers in their petition for a continuation of the surcharges; that is to say, they now decline to permit the pooling arrangement

and the loans to various members of the carrier group, but insist that each carrier keep for itself the payments resulting from the additional surcharges. As has been pointed out in one or more other expressions, it is just a matter of bookkeeping now to refer to these increases as "surcharges"; merely a matter of allowing the respective carriers to charge just that much more and to keep it for themselves, whether strong or weak.

After all, I do not believe any living man can tell with anything approaching certainty whether these increases have resulted in benefit or detriment to the carriers. Of course it is merely a problem of simple arithmetic to multiply the number of hundreds of pounds or of tons of the commodities carried under the permitted surcharges by the amount of the surcharges to arrive at the claimed result that said surcharges have benefited the carriers for just a fractional part of what it was hoped they would be benefited; but this primary calculation does not take into consideration (and I do not know how it can be arrived at) the amount of traffic which the carriers have lost altogether by reason of the addition of the surcharges; and wherever any has been lost it should be remembered that the loss is not simply of the surcharge, but of all that the carriers would have received had they not lost the traffic. Consequently I say that, in my opinion, no man can tell whether there has been a benefit; and each must use only his best judgment. It is my best judgment that the surcharges have not benefited the carriers. I have tried to give all the force reasonably and logically possible to the argument that managerial discretion should be allowed to determine this disputed question. However, the law places upon this commission, as I view it, the duty to use its discretion where a question of the preservation of the revenue of the carriers is involved, just as it places that responsibility upon the commission in determining what are reasonable rates and charges. It is altogether possible that, just as in the trial of any litigated matter, the testimony of certain witnesses will very naturally carry greater weight than the testimony of other witnesses, even of equal veracity; and this is because of the greater experience and means of knowledge of certain witnesses. Now, in a case where the law puts the exercise of discretion upon the commission, that is as far as I think the commission could go

in recognizing and giving full weight to the opinion and the testimony of the railroad executives. Their testimony should be given great weight because of their experience, but it can not be said that this commission must neces- [fol. 239] sarily adopt their opinion. If it were otherwise, why the necessity of coming here at all?

After all, in my opinion, it is volume of traffic which must, and which we all hope will, improve the condition of the carriers. For this traffic they must depend upon the various industries throughout this broad land. Not only do I think it a mistaken exercise of our discretion, in an effort to preserve the revenue of the carriers, to allow to continue even these comparatively small increases when, in these distressing and highly competitive times, even a few cents a ton may change the method of transportation selected, but I also believe that the various industries themselves are entitled to expect to pay only a rate which represents the value to such industry of the service rendered. If the industries from which the traffic arises fail, then traffic is dried up. The whole process must be a cooperative one, based upon what I think must be the recognized principle of economics, that the agencies of transportation and the industries which make the traffic to be transported are mutually interdependent.

There was no promise held out that the rates would be continued after March 31, even admitting that any such permission might be granted if conditions then justified the granting. It seems to me, therefore, that the carriers might well have been anticipating the preparation of schedules proposing to change their various basic rates to meet the loss of the surcharges, particularly when our former reports have indicated that the commission would expect or desire that the pooling plan be used, and the carriers have announced that they would not, after March 31, continue the pooling plan. Nor do I think any appreciable part of the six months' continuance allowed by the report of the majority is necessary in order to prepare schedules simply asking that the basic rate be changed to meet the loss of the surcharges. While not prejudging, even to the extent of my own vote, what I would do if such course were taken, it is entirely possible that the commission itself, or acting through the proper division thereof, might grant sixth-section relief so as to enable these changed schedules to be published on something less than the statutory notice.

There is much said in the other dissenting opinions which I approve, and I shall not, therefore, lengthen this expression; but I have felt that I should make it in order to express the views which cause me to take a different attitude from that of the majority of my brethren.

[fol. 240] EXHIBIT No. 4 TO ANSWER OF I. C. C.

18035

Interstate Commerce Commission

No. 25135

Increases in Intrastate Freight Rates

Submitted June 30, 1932. Decided September 29, 1932

Intrastate rates on certain class and commodity traffic required by State authority in Arkansas, Idaho, Kentucky, Louisiana, Montana, Nebraska, Oklahoma, Texas, and Utah through failure or refusal to permit application of surcharges corresponding to those maintained on interstate traffic found to result in unjust discrimination against interstate commerce. Proceeding discontinued as to intrastate rates in Arizona.

M. G. Roberts, A. W. Kendall, E. N. Larson, Harvey Allen, B. P. Souders, Dana T. Smith, Douglas F. Smith, M. L. Countryman, Jr., Conrad Olson, O. H. Timm, E. F. Rice, L. N. Bradshaw, H. B. Cummins, A. MacKenzie, N. L. Callens, W. Hal Farr, J. M. Souby, T R. Woodrow, J. A. Gallagher, Van Cott, Riter & Farnsworth, H. B. Tooker, W. A. Northcutt, E. D. Mohr, Elmer A. Smith, J. T. Quisenberry, M. Carter Hall, H. G. Fitzpatrick, Frank W. Gwathmey, W. N. McGhee, C. S. Burg, J. N. Davis, J. E. Lyons, Harry McCall, Walter McFarland, C. M. Spence, R. E. Milling, Jr., W. J. Schill, W. H. Malcolm, Arthur E. D'Herete, Joseph Lallande, W. H. Stakelum, C. W. Brosius, Esmond Phelps, J. R. Bell, G. H. Muckley, B. H. Stanage, J. C. Winfield, H. E. Rilley, H. H. Larimore, F. B. Clark,

Eldon M. Martin, G. A. Hoffelder, C. C. Weedin, Harry Gillies, and M. A. Rawlings for respondents.

C. B. Bee, Homer L. Dunlap, Jr., and H. L. Bennett for Corporation Commission of Oklahoma; J. M. Thompson, J. D. Rigney, M. Reese Hattabaugh, and Bert L. Penn for Public Utilities Commission of the State of Idaho; Francis A. Silver for Board of Railroad Commissioners of the State of Montana; John F. Bonner for State of Minnesota; John E. Benton and Clyde S. Bailey for National Association of Railroad and Utilities Commissioners; Elbert Hooper, O. D. Hudnall, R. I. Wells, and W. A. Weeks for Railroad Commission of Texas; E. E. Corfman and Thomas E. McKay for Public Utilities Commission of Utah; Orton S. Hogan and L. F. Orr for Kentucky Railroad Commission; Wylie M. Barrow, L. F. Sherer, Francis Williams, and Harry D. Wilson for Louisiana Public Service Commission; P. A. Frye and Wylie M. Barrow for Louisiana Highway Commission and Louisiana shipping interests; Ed. Harper, Reece Caudle, Clay S. Henderson, Robert F. Smith, and [fol. 241] A. D. Beals for Arkansas Railroad Commission; and C. A. Sorensen, Hugh Lancaster, and C. A. Ross for Nebraska State Railway Commission.

R. F. Campbell for Missouri State Railway Company; I. G. Bentley for Oklahoma City Chamber of Commerce and Oklahoma City Jobbers & Manufacturers Association; M. H. Champion for Anderson Prichard Oil Corporation, Colorado-Texas Refining Company, and Oil Shippers Committee of Oklahoma; R. E. Stewart for Barnsdall Refiners, Incorporated; P. H. Kuhns and D. L. Gilman for Continental Oil Company; T. H. Riggin for H. F. Wilcox Oil & Gas Company; A. F. Winn and R. D. Pearce for Skelly Oil Company; B. J. Burchett for Deep Rock Oil Corporation; C. F. Dowd for Tidal Refining Company; A. C. Holmes for Empire Oil & Refining Company; Warren Nichols, W. P. Coughlin, and C. A. Butler for Anaconda Copper Mining Company; R. R. Veldman for J. Neils Lumber Company and Montana Lumber Manufacturers Association; R. H. Paull for Hansen Packing Company; E. E. Williamson, E. H. Smith, and Ewing H. Scott for Newport Rolling Mill Company, Hardy-Burlingham Coal Company, Globe Iron Roofing & Corrugating Company, and Andrews Steel Company; Wilbur LaRoe, Jr., and F. E. Brown for Hansen Packing Company and Southern Kraft Corporation;

Benjamin J. Brooks for Southern Kraft Corporation; W. M. Maddox for Magnolia Petroleum Company; H. B. Cole for Taylor Refining Company; Walker Wilson for Cosden Oil Company; F. G. Robinson for Lone Star Gas Company, Lone Star Gasoline Company, and Texas Pacific Coal and Oil Company; Russell G. Lucas and Warren Nichols for Utah Chapter of American Mining Congress; J. S. Earley for Utah Manufacturers Association, Utah Manufacturers Employees League, Utah State Farm Bureau, Utah Poultry Producers Cooperative Association, Utah Horticultural Association, Utah Beekeepers Association, Salt Lake Real Estate Board, Boxelder Chamber of Commerce, Logan Chamber of Commerce, Ogden Chamber of Commerce, Provo Chamber of Commerce, and Utah Shippers Traffic Association; H. W. Prickett and M. H. Love for Utah Coal Producers Association and Nephi Plaster & Manufacturing Company; W. H. Lovesy for Utah Oil Refining Company; A. C. Ellis for Columbia Steel Company; W. A. Knight for State Highway Department of Kentucky and various chambers of commerce and shippers' associations; A. G. Linnemann and R. A. Ellison for Kentucky Fire Brick Company and others; L. F. Orr for Bowling Green Business Men's Association and others; J. E. Marks for Lee Clay Products Company; J. W. Hibarger for various shippers; Roy Carson for Harlan County Coal Operators Association and others; H. A. L. Swan for Southern Kraft Corporation; W. N. Webb for Celotex [fol. 242] Company; M. J. McMahon and E. W. McKay for Bogalusa Paper Company and others; Ned A. Stewart for Meriwether Sand & Gravel Company and others; Harry B. Nelson for Louisiana Paving Contractors; Edgar Moulton and C. A. Mitchell for New Orleans Joint Traffic Bureau; Lawrence F. Daspit for Brown Paper Mill Company and others; W. S. Cornell for Shreveport Chamber of Commerce; W. Burgess for Louisiana Division of National Cotton Seed Association; J. M. Wood for Monte & Company, Incorporated; I. Schaffenburg for Bay Chemical Company; J. F. Jordan for Alexandria Chamber of Commerce and others; C. W. Moffett for Monroe Sand & Gravel Company and others; Ben F. Bayha for Newport Industries, Incorporated; Wylie M. Barrow for Nelson Brothers and various road-building contractors in Louisiana; J. E. Gaughan for Southern Kraft Corporation; J. C. Murray

for Little Rock Chamber of Commerce, Fort Smith Traffic Bureau, Hodson & Dugger Company, J. H. Hamlin & Sons, W. W. Wilson Stave Company, Balz Cooperage Company, and Wrape Stave Company; M. W. Martin for Newhouse Chemical & Supply Company, Arkansas Fertilizer Company, Rose City Cotton Oil Company, Temple Cotton Oil Company, and Southern Cotton Oil Company; Mac Martin for Pine Bluff Chamber of Commerce; P. G. Anderson for Lion Oil Refining Company and other refiners in El Dorado, Ark.; Ford Miggard for Owosso Manufacturing Company; Harrison M. Smith for Lincoln Chamber of Commerce; H. D. Bergen for National Stone Company and Ashgrove Lime & Portland Cement Company; Thomas Sullivan for National Stone Company; W. S. Barton for Ashgrove Lime & Portland Cement Company and National Stone Company of Omaha, Nebr.; B. M. Fell for Sioux City Brick & Tile Company, Ballou Brick Company, L. G. Everist, Incorporated, and C. F. Lytle Construction Company; J. A. Little for Nebraska Brick & Tile Association; E. P. Ryan for Nebraska Traffic League, Polenske Brothers, and Schellak & Company of Hastings, Nebr.; M. J. Healy for Washington County Sand & Gravel Company; H. E. Schellberg for Western Limestone Products Company; and George D. Schellberg for Schellberg Sand & Gravel Company.

Report of the Commission

By the COMMISSION:

This investigation was instituted on petition of various carriers to determine whether, through the failure or refusal of the railroad rate-regulating authorities of certain States to permit increases in freight rates for intrastate traffic corresponding to those which we approved for interstate traffic in Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 179 I. C. C. 315, such intrastate rates cause or will [fol. 243] cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce, on the other, or any unjust discrimination against interstate or foreign commerce; and, if so, what rates shall be prescribed to remove such unlawful advantage, preference, prejudice, or discrimination. The investigation is divided into several separate parts, one for each State

whose rates and charges are brought into question, and in each instance the State authorities were duly notified in accordance with the provisions of section 13 (3) of the interstate commerce act. Each part is presented on its own separate record and will be considered separately. This report deals with all parts, except Part 6—Minnesota, Part 11—Wisconsin, and Part 13—West Virginia, and yet heard. Except as otherwise indicated, rates and increases therein will be stated in amounts per 100 pounds, and rates applicable interstate will be inclusive of the increases approved in the case above cited.

In June, 1931, carriers by railroad and by water throughout the country filed with us an application asserting that an emergency existed and seeking authority to make a general increase of 15 per cent in their freight rates and charges subject to our jurisdiction. Specifically, they sought special permission to file tariffs providing for such an increase in blanket supplement form, and a determination by us that those tariffs, when so filed, might become effective without suspension. The proceeding was docketed as Ex parte No. 103, and our decision was reported in Fifteen Per Cent Case, 1931, supra. It was shown that the earnings of the carriers, due to great shrinkage in traffic, were grossly inadequate, that their credit was vitally impaired, and that they were confronted by a serious financial emergency. Nevertheless, upon the voluminous evidence presented, we found "that a 15 per cent increase in all freight rates and charges would increase revenues, if at all, only temporarily and that its ultimate effect, not very long postponed, would be to harm rather than help the railroads," and also "that such an increase would raise the rates upon many kinds of traffic above a just and reasonable level." The situation was so serious, however, that we proposed a substitute measure of relief, stating:

> It is motived by the thought that the distrust of railroad securities is rapidly gaining such elements of panic that a slight charge on the industries of the country best able to stand it may justifiably be imposed, through freight rates, for the purpose of increasing confidence and averting developments which might further disturb an already tremendously shaken financial situation, and to avoid impairment of an adequate system of transportation.

The plan was "designed to avoid imposing burdens on industry which can not reasonably be borne under present [fol. 244] conditions, to limit the danger of diversion of traffic to other forms of transportation, and to disturb business conditions as little as possible by preserving, very generally, existing rate relations." The increases were very small, varying from 6 cents per ton to 2 cents per 100 pounds. Some commodities, largely agricultural products, were excluded. The increases were also flat; i. e., the same for hauls of all lengths, except that the total increase in any charge was limited to 10 per cent, a limitation which operated only in the case of very short hauls. They were to expire on March 31, 1933, unless the time was extended.

As a further feature of the plan we stated that we would rely upon the carriers, in accordance with their agreement, to marshal the revenues accruing from the increases and thus create a fund for making loans to carriers which failed to earn their fixed charges. The carriers have justified this reliance. They are collecting and disbursing the fund through the Railroad Credit Corporation, an agency specially constituted for this purpose. On the basis of the traffic of 1931, intrastate as well as interstate, we estimated that the increases would yield from $100,000,000 to $125,000,000 per year; but, due to a further sharp fall in traffic, the indications are that a much smaller sum will be realized in 1932. In the instant proceeding the president of the Railroad Credit Corporation testified that the fund is likely to fall $40,000,000 short of meeting the fixed-charged needs for which it was created.

We stated that we would grant the necessary authority under section 6 to permit the filing of blanket supplements providing for the increases which we proposed, and that they would be permitted to take effect without suspension——

subject to the proviso that we shall reserve discretion to require minor changes in the details thereof; and that the resulting rates will in all respects be subject to investigation and determination as to the lawfulness of particular rates or schedules of rates, as provided by the act.

There was no finding that each and every rate so increased would be a maximum reasonable rate, because a

finding on this point was both impracticable and unnecessary. We did, however, state:

The freight articles selected by us in this connection were those for the transportation of which we believed the rates could be somewhat increased without causing the traffic to be transferred to other agencies of transportation and without bringing about an undue disturbance in business conditions or transgressing the bounds of maximum reasonable rates.

This selection was made in the light of detailed evidence of record in regard to the various commodities and the conditions surrounding their transportation, including the competition of other agencies of transportation. There was no requirement, however, that the rates so increased should be maintained as minimum rates, and the carriers were left [fol. 245] free to reduce them, if experience should show that more traffic and revenue could be obtained by a reduction.

In the administration of the interstate commerce act a definite class of cases has come to be recognized where the paramount question is the general level of rates throughout the country or in territorial parts thereof, i. e., whether the aggregate revenues of the carriers shall be increased or reduced by a change in this general level. These are known as general-revenue cases. For reasons which are apparent, it is impracticable in such proceedings to consider individual rates. It is necessary to deal with rates in the aggregate or by broad classes, and the rights of shippers and carriers with respect to individual rates are protected by a saving clause which makes the general findings without prejudice to subsequent findings in individual situations. The Supreme Court has recognized the practical necessity of dealing with the general rate level in this way. For example, in New England Divisions Case, 261 U. S. 184, at pages 197-198, the Court referred with approval to the following passage from our report in New England Divisions, 66 I. C. C. 196, 203:

In all such general rate cases we have realized and have held that if we were required to consider the justness and reasonableness of each individual rate, the law would in effect be nullified and the commission reduced to a state of administrative paralysis.

Increased Rates, 1920, 58 I. C. C. 220, and Reduced Rates, 1922, 68 I. C. C. 676, were both general-revenue cases. In describing our findings therein, the Court said, in Brimstone R. R. Co. v. United States, 276 U. S. 104, 123:

Neither case approved "any specific rate as reasonable in itself or as properly adjusted with respect to other rates nor did it justify in advance any rate which might be published as a result thereof." In them the Commission was dealing with the whole body of rates throughout the country—was looking at the general level of all rates and the propriety of the rates to which the Brimstone Company was party was not the subject of particular investigation or consideration.

Ex parte No. 103 also was a general-revenue case, and it dealt in the aggregate with broad classes of rates throughout the entire country. It approved general increases of those classes without consideration of individual rates, and protected the rights of shippers and carriers with respect to such rates by the saving clause, already quoted, that the "resulting rates will in all respects be subject to investigation and determination as to the lawfulness of particular rates or schedules of rates, as provided by the act." Revenue considerations affecting the operations of the carriers in their entirety, both intrastate and interstate, were paramount in the findings, and the existing rates to which it was contemplated that the increases would be applied were the result of a comprehensive system of public regulation which [fol. 246] had been in force, in both the Nation and the States, for many years.

The plan of augmenting the revenues of the carriers which was adopted was framed in the light of the conditions disclosed of record and in the hope that it would help the general financial situation with benefit to all concerned, and it sought to produce the maximum effect of this character consistent with the imposition of minimum burdens upon distressed industry and minimum disturbance of business conditions. To this end it appealed to a spirit of cooperation on the part of both shippers and carriers. It was so received, very generally. The increases, which have come to be known as surcharges and will be so termed hereinafter, became uniformly effective interstate on January 4, 1932, and in general have since been maintained. In

a spirit of cooperation the State commissions also permitted them to become quite generally effective intrastate. We are dealing in the instant proceeding with certain of the comparatively few exceptions where the surcharges were not permitted to become effective intrastate.

We have gone into this description of Ex parte No. 103 with some particularity because the character of the proceeding and of the action there taken is a matter of essential importance in the determination of the issues now before us.

Prior to the transportation act, 1920, we had authority over intrastate rates, for the protection of interstate commerce, only under section 3 of the act to regulate commerce. As a prerequisite to the exercise of such authority, therefore, it was necessary to find that the intrastate rates were causing undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand. In 1920, however, by what is now paragraph (4) of section 13 of the interstate commerce act, our authority was enlarged to permit us to regulate intrastate rates, not only under the circumstances above described, but also if it were found that they were causing "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce"; and such discrimination was "forbidden and declared to be unlawful."

In Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563, this new provision was interpreted. Pointing out that the new section 15a had imposed on us an affirmative duty "to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States," that intrastate rates and the income from them must play a most important part in attaining this end, and that the "effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair [fol. 247] proportionate share of the cost of maintaining an adequate railway system," the court said, at page 586:

> When we turn to paragraph 4, section 13, however, and find the Commission for the first time vested with a direct power to remove "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," it is impossible to escape the dovetail relation between that provision and the purpose of section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commis-

sion is authorized to end the disparity by directly removing it, because it is plainly an "undue, unreasonable, or unjust discrimination against interstate or foreign commerce," within the ordinary meaning of those words.

This conclusion was further elucidated by the court, at pages 589-590, where it said:

Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work.

It is, therefore, clear that we have authority over intrastate rates for the purpose of protecting the general revenues of the carriers needed in the maintenance of an adequate national railway system, and wherever necessary "to restrain undue limitation of the earning power of the interstate commerce system in doing state work."

In Dayton-Goose Creek Ry. v. U. S., 263 U. S. 456, 478, the court described the transportation act, 1920, in this striking language:

The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and

in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

It is plain that in the exercise of our authority over intrastate rates which was conferred by the transportation act, 1920, and in the determination of the extent of and limitations upon that authority, the "great purpose" of that act, as described by the court, is a paramount consideration to be kept ever in view. With it in view, then, we proceed to [fol. 248] the discussion of three matters which have assumed prime importance in the present proceeding.

1. In Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563, the court said that if the purpose of section 15a is interfered with by a "disparity of intrastate rates," we are authorized "to end the disparity by directly removing it." What is such a "disparity of intrastate rates" and when may it be found to exist? The question is a simple one in the case of rates which have been adjusted in relation to a uniform distance scale applicable both interstate and intrastate. In such instances, of which there are a considerable number in this proceeding, an increase in interstate rates unaccompanied by a corresponding increase in intrastate rates plainly creates a disparity in the latter rates. The question is not so simple, however, where, as is often the case, the rates are not so made but, by reason of competitive or commercial conditions, are characterized by large groups or blankets or depart in other respects from distance uniformity. It such situations it is normally possible to show that certain intrastate rates are higher, mile for mile, than corresponding interstate rates, that the reverse is true in other instances, and that there are like differences between various interstate rates and also between various intrastate rates. When may a "disparity in intrastate rates" be found to exist under these latter conditions?

The answer to this question must be influenced, we believe, by the character of the proceeding. In a general revenue case, as we have seen, it is wholly impracticable to consider individual rates, but the rights of interested parties with respect thereto are protected by a saving clause. Where an increase in the general level of rates, however, is required to sustain a railroad system "adequate to the needs of the country," to use the words of the court, it is manifest that

the "great purpose" of the act can not be accomplished unless intrastate rates are dealt with in the same way as interstate rates. In Increased Rates, 1920, supra, we did not, as the court has pointed out, approve "any specific rate as reasonable in itself or as properly adjusted with respect to other rates," nor did we "justify in advance any rate which might be published as a result thereof." Nevertheless, our orders requiring increases in certain intrastate fares corresponding to those which were approved for interstate fares in that case were sustained in Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., supra, and in New York v. United States, 257 U. S. 591; and numerous other orders affecting both intrastate rates and fares became effective without contest following those decisions.

Like the findings in Increased Rates, 1920, supra, the findings in the intrastate rate cases which followed it contained [fol. 249] a saving clause. Using Wisconsin Passenger Fares, 59 I. C. C. 391, 397, as an illustration, this clause was as follows:

> These findings are without prejudice to the right of the authorities of the state of Wisconsin or of any other party in interest to apply in the proper manner for a modification of our findings and order as to any specified intrastate fares or charges on the ground that the latter are not related to the interstate fares or charges in such a way as to contravene the provisions of the interstate commerce act.

This saving clause was referred to with approval in Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co. supra, at page 579, the court stating:

> Any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute.

The distinction between a general-revenue case and one where particular rates are involved was also recognized in Florida v. United States, 282 U. S. 194, at page 213.

The present investigation is the outgrowth of a general-revenue case in which we considered the revenue needs of the carriers in their entirety, without distinction between interstate and intrastate traffic. All that the petitioning carriers are here seeking is an opportunity to apply the same surcharges on certain intrastate traffic as have already

been applied and are in effect on corresponding interstate traffic, and also on much corresponding intrastate traffic. Whatever relationships existed between the intrastate and the interstate rates prior to the increase in the latter will be restored, if this opportunity is granted, and until it is granted they are disrupted. Under such circumstances, and keeping in view the great remedial purpose of the 1920 legislation, the nonapplication of the surcharges intrastate creates, in our opinion, a "disparity in intrastate rates" within the meaning of the court in the Wisconsin case. Any order requiring the removal of such a disparity should, of course, be accompanied by a saving clause like that which was approved in that case.

2. In Georgia Comm. v. United States, 283 U. S. 765, 770, the court said:

It is true that when state rates are assailed on the ground that they result in undue prejudice to interstate shippers or discrimination against interstate commerce, the Commission must determine whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level. State Corporation Comm. v. Aberdeen & Rockfish R. Co., 136 I. C. C. 173.

State commissions and shippers strongly urge that in Fifteen Per Cent Case, 1931, supra, we made no finding that the resulting rates would be reasonable, and hence that there is here no basis for requiring the intrastate rates to be raised. As before indicated, we made no finding that each and every rate would be reasonable, because such a finding was both impracticable and unnecessary. We did state that the [fol. 250] freight articles selected for the application of the surcharges "were those for the transportation of which we believed the rates could be somewhat increased without * * * transgressing the bounds of maximum reasonable rates."

The important thing is the principle underlying the statement above quoted from the Georgia case. The particular words which were used are to be considered in the light of the circumstances which then confronted the court. The Georgia case did not emanate from a general-revenue case and dealt chiefly with "undue prejudice and discrimination to interstate shippers and localities," as is made clear by

the comments on page 773 of the court's opinion. When a "disparity of intrastate rates" is found to exist, the question is whether it is just and right that this disparity should be corrected by requiring an increase in State rates. Obviously this should not be done unless the fault lies in those rates. If the fault is in the interstate rates, it is they which should be changed. Where specific rates are in issue and no general increase in the level of rates to meet revenue needs is involved, plainly the fault is to be located by applying the yardstick of interstate rates definitely found to be reasonable. Where the disparity is the outgrowth of a general-revenue case in which rates were dealt with in the aggregate or by general classes, the fault can not be so located. Nevertheless it is possible to apply the same test to the intrastate rates as was applied to the interstate rates, and this is, we believe, the essential principle to be followed. To do otherwise would, as the court suggested in the Wisconsin case, "completely block the remedial purpose of the statute." Manifestly both classes of rates must be dealt with in the same way, and subject to similar reservations protecting the future, if the transportation needs of the country are to be met, to say nothing of the extraordinary conditions and the serious financial emergency by which we were confronted in Ex parte No. 103.

3. In Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., supra, the court said, at page 591:

It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper an application to the Interstate Commerce Commission for an appropriate exception.

Likewise, in Florida v. United States, supra, the court said, at page 214:

In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question is that of relation of rates to income. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage.

And again, at pages 214-215;

[fol. 251] The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service.

A finding as to the future revenue effect of increased rates is not, strictly speaking, a finding of fact but a prediction. The evidence may be such that a prediction may be made with reasonable assurance of accuracy; and in such instances it sufficiently approximates a fact so that a finding is justified. In other instances the result may be wholly problematical, and no definite finding can be justified. We have never felt that we ought to forbid a proposed increase in rates on the sole ground that we are unable to find that it will accomplish its purpose, where the outcome is plainly a mere matter of judgment. The decision of such questions of judgment is a responsibility of management, and we are not the managers of the railroads.

In Ex parte No. 103, voluminous evidence in regard to the probable revenue result of the proposed 15 per cent increase in rates was presented by shippers and little or none by the railroads. In view of competitive conditions, the trend of commodity prices, and other factors, we were convinced that such an increase would in the end hurt rather than help the earnings of the carriers, and hence disapproved it. We were not persuaded that the much smaller surcharges, which we finally approved, would have a similar result. The evidence did not justify a definite finding on this point, and we left the application of these surcharges to the judgment of the managements. If the results were unfavorable, the managements were also left free to eliminate the surcharges or reduce the rates still further. A similar policy should, we believe, be followed in this proceeding.

In the Florida case, which dealt with specific rates and was not the outgrowth of any general-revenue case, the Supreme Court held that before requiring an increase in the intrastate rates, it was necessary for us to find that the increase "would produce, or was likely to produce, additional in-

come." It is significant that it did not so hold in the Wisconsin case, which did emanate from a general-revenue case. Stating that the effect of a general order increasing all rates, like the one at bar, might, in particular localities, "reduce income instead of increasing it," it said that such cases would be "within the saving clause of the order," and make proper an application to the commission for an appropriate exception. In other words, the results were to be governed by experience rather than prediction.

While we have indicated our general conclusions upon these three controverted points, they will not here be ap- [fol. 252] plied in any rigid way and we shall take into consideration the special circumstances and conditions, if any, which surround each case and which are disclosed of record.

Before proceeding to the consideration of the evidence submitted in each of the separate parts of the proceeding, certain other general observations are desirable. No reason appeared in Ex parte No. 103 for adjusting the surcharges to differing transportation conditions in different parts of the country. There is, therefore, no occasion in this proceeding for considering similar differences in transportation conditions between State and interstate traffic. While the evidence before us would in many instances justify findings of undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, this evidence is more or less fragmentary, and we shall, therefore, confine our findings to the matter of unjust discrimination against interstate commerce. Where we make such a finding and require an increase in the intrastate rates, it is to be understood that we conclude that no positive finding in regard to the revenue outcome of the increase can be justified. Every finding of unjust discrimination will be accompanied by a saving clause, such as was approved by the Supreme Court in the Wisconsin case, and we shall require the surcharges to be applied on the intrastate traffic only so long as they are contemporaneously maintained on corresponding interstate traffic.

Part 1—Arizona

The Arizona Corporation Commission granted the carriers' application, except that it did not permit any surcharges on cottonseed meal and cake, copper ore and con-

centrates, lead ore and concentrates, ore and concentrates, n. o. s., and fluxing stone, in carloads. Although the Arizona carriers originally joined in the general petition for this investigation, they are apparently willing to accept the State commission's viewpoint. Upon their request the hearing in this part of the case was canceled. The proceeding, in so far as it relates to Arizona, will accordingly be discontinued. We assume that these carriers will cancel the surcharges on corresponding interstate traffic moving under like conditions.

Part 2—Arkansas

The Arkansas Railroad Commission denied the carriers authority to apply the surcharges on the following commodities: (1) Furniture; (2) refined petroleum products under consideration in No. 17000, Part 4-A; (3) rough material as described in respondents' lumber tariffs, when moving to [fol. 253] plants for manufacturing purposes; (4) pulpwood, heading bolts, and staves; (5) superphosphates or ammoniated superphosphate; and (6) fertilizer and fertilizer materials.

In the supplemental report in Fifteen Per Cent Case, 1931, 179 I. C. C. 215, 240, it was stated that:

3. Shipments of petroleum products and furniture, moving under rates the same as or less than those prescribed or approved in No. 17000, Parts 4, 4-A, and 5, shall not be subject to any surcharge under these findings, on and after the dates when the rates covered by said findings become effective.

The revision of rates on furniture pursuant to No. 17000, Part 5, Furniture, 177 I. C. C. 5, became effective February 25, 1932. However, respondents continued in effect thereafter, for what they said would be a comparatively short period, all commodity rates lower than those prescribed. Respondents here seek to apply a surcharge of 2 cents on furniture in Arkansas pending further revision of furniture rates. But to-day the interstate furniture rates are the same as or less than those prescribed or approved in the case above cited, and include no surcharge. Therefore, there is now no ground for requiring the application of a surcharge intrastate within Arkansas.

For interstate rates on petroleum we approved a surcharge of 1 cent, to expire upon the effective date of the rates prescribed in No. 17000, Part 4-A, Refined Petroleum Products in the Southwest, 171 I. C. C. 381. Rates prescribed in that case were published from Arkansas origins to Texas destinations effective December 15, 1931, but the adjustment in other respects was postponed until August 10, 1932. It became effective on that date. Therefore, no occasion now exists for requiring the application of the surcharge in Arkansas.

On rough lumber, heading bolts, and stave bolts moving into plants which manufacture and ship such commodities as lumber, staves, or other articles taking the lumber rates or rates based thereon, the Arkansas commission denied authority to the carriers to apply any surcharge. The surcharge authorized by us on lumber, heading bolts, and stave bolts is 12 cents per ton. Similar plants are located in all of the Southwestern States bordering Arkansas. The State commissions of Missouri, Oklahoma, and Texas permitted the surcharge within those States on stave bolts. The total movement of the rough material in Arkansas for a representative year was 135,533 tons, on which the carriers estimate the surcharge would have yielded $16,263.96.[1]

[fol. 254] We provided that where shipments are accorded transit on basis of a through transportation rate, there should be only one surcharge for the through movement. The surcharge tariff applicable on interstate traffic provides:

Where freight is accorded a transit privilege under tariffs which provide for the computation of transportation charges on a different basis into and out of the transit point (such as proportional rates to and/or from the transit point), the emergency charge shall be either that accruing for the movement into the transit point or that accruing for the movement beyond the transit point, whichever is higher.

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[1] The surcharges which we approved were subject in all instances to the limitation that "In no event shall the increase levied on any shipment be in excess of 10 per cent of the charges which would be assessed in the absence of the increase." In their computations of increased revenue which would result from application of the surcharge the carriers were unable to give effect to this limitation.

On interstate traffic, therefore, there is now only one surcharge on rough lumber, heading bolts, or stave bolts into points of manufacture and moved outbound in the form of lumber or staves. The Arkansas commission has not denied authority to the carriers to apply the surcharge on rough lumber, heading bolts, or stave bolts when moving in local commerce independent of any outbound movement of the manufactured commodity. It appears that in no case would the surcharge on rough lumber, heading bolts, or stave bolts be higher than the surcharge on the finished material shipped out of the manufacturing point. Consequently, what the Arkansas commission has done appears in effect not to be different from what has been done with respect to interstate traffic. There is, therefore, no occasion for requiring any further application of the surcharge on this intrastate traffic.

On pulpwood we approved a surcharge of 6 cents per ton. This commodity within Arkansas moves principally to paper mills at Camden. The movement within the State for a period of a year amounted to 91,690 tons, on which the surcharge would have yielded $5,501.40. It is not shown that there is an interstate movement of this commodity to or from Arkansas. A representative of the State commission testified that the evidence before it led the commission to believe that if the surcharge were added to the rates on pulpwood, the paper mill at Camden would divert the movement to trucks, and draw its supply of pulpwood from a tract of lumber within a few miles of its plant.

On superphosphate the State commission initially permitted the carriers to apply the surcharge of 1 cent. Later, upon formal complaint, it prescribed certain intrastate rates on superphosphate and ammoniated superphosphate for application from Little Rock and Texarkana, Ark., which are relatively lower than those authorized on interstate traffic. These commodities are also manufactured at Memphis, Tenn., and shipped to Little Rock, Hope, and Texarkana, Ark. Another manufacturer in East St. Louis, Ill., [fol. 255] ships to various points in the Southwest, including Arkansas. The surcharge is applicable on these commodities throughout the Southwest, except within Arkansas and Louisiana.

On fertilizer and fertilizer materials we authorized a surcharge of 1 cent, but the State commission denied application of this surcharge intrastate.

Respondents' witness testified that the application of the surcharges on all of the traffic under consideration would in his judgment result in increased revenues to the carriers. The Arkansas commission objected to any evidence relating to increased revenues which might result from the surcharges, on the ground that the scope of investigation is not sufficiently broad. The objection was not well founded.

We find that, in view of the surcharges which have become effective interstate in the freight rates on the commodities here in question, under our findings in Fifteen Per Cent Case, 1931, supra, respondents' intrastate rates in Arkansas on these same commodities, to which no corresponding surcharges have been added, have resulted and will result in unjust discrimination against interstate commerce, except in the case of the intrastate rates on furniture, refined petroleum products, rough lumber, heading bolts, and stave bolts. We further find that this unjust discrimination shall be removed by applying to the present intrastate rates in Arkansas on said commodities, except those specified above, the same surcharges as are and for the future may be contemporaneously maintained by respondents, in accordance with the findings in Fifteen Per Cent Case, 1931, supra, on corresponding interstate traffic.

These findings are without prejudice to the right of the authorities of the State of Arkansas or of any other party in interest to apply in the proper manner for a modification of our findings, and order if one is issued, as to any specified intrastate rate on the ground that the latter is not related to interstate rates in such a way as to contravene the provisions of the interstate commerce act.

Part 3—Idaho

The Public Utilities Commission of Idaho denied application of the surcharges on the commodities, in carloads, named in the following table. The table also shows data offered by the principal Idaho carriers as to the volume of movement in 1931, together with the estimated amount of yearly revenue loss, $22,610.58, resulting from inability to apply the surcharges. The State commission likewise exempted dried beans and peas, agricultural implements, and poultry, in less than carloads, but the volume of such movement is small.

[fol. 256]

Commodity[1]	Idaho[2] intrastate movement in 1931 Tons	Revenue[3] loss
Bituminous coal	110	$6.20
Lead ore and concentrates	269,064	6,375.54
Zinc ore and concentrates	1,846	110.76
Ore and concentrates, n. o. s.	1,166	69.77
Gravel and sand (other than glass or moulding)	13,546	811.64
Stone, broken, ground, or crushed; coated sand; and coated-rock building material	192	9.49
Phosphate rock, crude (ground or not ground)	160	19.20
Posts, poles, and piling	15,145	1,787.39
Lumber	49,300	5,261.99
Box, crate, and cooperage materials	608	72.96
Alfalfa seed	264	52.80
Beet pulp or residue	26,052	5,210.40
Clover seed	64	12.80
Fuel, road, and petroleum residual oils	495	92.84
Cement, natural or Portland (building)	10,312	2,062.40
Brick, common	2,728	534.20
Brick, n. o. s., and building tile	64	11.00
Lime, common (quick or slaked)	20	4.00
Feed, animal or poultry	528	105.60
Total	391,664	22,610.58

[1] The Idaho commission also denied application of the surcharges on wool, copper ore and concentrates, lath and shingles, grass seed, and crude petroleum, but no intrastate movement of these commodities in 1931 was shown by the carriers.

[2] The figures for the Oregon Short Line Railroad Company were based on actual movements for April, July, and November, 1931, and those for the Great Northern Railway Company on movements for January and October, 1931, equated to a year basis. The figures for other carriers are for the year 1931.

[3] The surcharges are, on coal, ore, gravel and sand, and stone, 6 cents per ton; on phosphate rock and the timber products shown, 12 cents per ton; and on the remaining commodities, 1 cent per 100 pounds.

To illustrate further the effect of the State commission's action, respondents compare the intrastate rates on many of the above commodities from and to certain Idaho points with interstate rates thereon between Idaho points and points in adjacent States for hauls of similar length. Where the intrastate and interstate rates are based on the same scale, the intrastate rates are, of course, the lower by the amount of the surcharge, but such scales generally apply only on sporadic or exceptional movements. The rates which move most of the traffic are specific commodity rates not based on a scale. Respondents' comparisons show the intrastate rates to be generally somewhat lower, relatively, than the interstate rates. They are alleged to be representative, but respondents offered practically no evidence as to actual traffic movement.

Similar comparisons leading to a different conclusion were offered by the State commission. They show intra-

state rates which are relatively higher than corresponding interstate rates. It is contended that these comparisons reflect actual movements more nearly and in other respects are more representative than respondents'. They are at least more voluminous and comprehensive.

The situation is quite evidently one of the general type, hereinbefore discussed, where rates are not based on a uniform distance scale, and hence discrepancies in rates [fol. 257] for hauls of similar length may readily be found.

Among the principal commodities excepted by the State commission are mine products. The lead and zinc mining and smelting industry in Shoshone County, in northern Idaho, is in serious condition. Ores are now of little value, as the prices of metals are very low. Plants are producing about half their former volume. They are generally operating at a loss. Operations are being continued mainly for the purpose of holding organizations together and avoiding distress among employees, but it is said that this can not go on very much longer if present conditions do not improve.

The surcharges are sought by respondents on ore from the mines into the mills and on concentrates from the mills into the smelters. They already apply on interstate movements of the metals to market.

A mill at Gem, Idaho, ships ore concentrates to Bradley, Idaho, 16 miles, for smelting and refining over a line of the Union Pacific system. Prior to January 7, 1932, it paid rates of $1.02 and 68 cents per ton, dependent upon value, but since then the rate has been 45 cents regardless of value. The reduction was the result of truck competition. Because of this competition the shipper refused a 50-cent rate offered by the Union Pacific, but finally agreed to accept a 45-cent rate and continue its shipments by rail. The surcharge would make the rate 49.5 cents. It is said that there are other like cases.

There is a small commercial coal mine at Talbot, Idaho, southwest of Yellowstone National Park. It has never yielded profit. Operating expenses are high because the veins are pitched from 45 to 90 degrees. The property has just come out of receivership, after having been shut down for several years. It has recently been shipping about two cars per week, but later in the year it is hoped that it may ship several cars per day. Its principal mar-

ket is in the Blackfoot country north of Pocatello, Idaho, in the upper Snake River Valley, but it ships slack coal to points farther south and west. Its fate to Idaho Falls, Idaho, is $1.65 on lump and nut and $1.45 on slack coal. The surcharge of 6 cents would add to the troubles of this mine. It has difficulty in meeting competition from Wyoming and Utah, although its rates are lower by 40 cents per ton to the destinations to which it generally ships than are its competitors'. The interstate rates of the latter have been increased by the surcharge. Competition is also met from fuel wood, on which we permitted no increase. Competition with natural gas is said to be in the offing.

The State commission permitted no increases on products of the forest on which we approved surcharges. One [fol. 258] of the principal Idaho lumber producers, which has operated in the red since 1924, objects to any increased burden and urges that the surcharges would appravate the present disastrous situation. This protestant during the first four months of this year paid $13,000 in interstate surcharges.

The Pacific & Idaho Northern Railway Company, a Class II carrier operating about 90 miles of line between Weiser and New Meadows, Idaho, did not join the other Idaho carriers in seeking increases before the State commission, and we do not understand that it seeks any here. The Idaho commission moved at the hearing that this part of the case be discontinued, on the ground that respondents' evidence was not sufficient to satisfy the requirements of section 13 of the interstate commerce act.

There is nothing of record which warrants the conclusion that the situation as to coal, forest products, or other commodities in Idaho except ores and concentrates, is different from that which exists in other parts of the country or in surrounding States where surcharges are now being assessed. Similar allegations with respect to the inability of certain commodities to stand any increased charges were made in Ex parte No. 103 and were considered in reaching our conclusions.

We find that in view of the surcharges which have become effective interstate in the freight rates on the commodities here in question, under our findings in Fifteen Per Cent Case, 1931, supra, respondents' intrastate rates

in Idaho on these same commodities, to which no corresponding surcharges have been added, have resulted and will result in unjust discrimination against interstate commerce, except in the case of the intrastate rates on ores and concentrates. We further find that this unjust discrimination shall be removed by applying to the present intrastate rates in Idaho on said commodities, except ores and concentrates, the same surcharges as are and for the future may be contemporaneously maintained by respondents, in accordance with the findings in Fifteen Per Cent Case, 1931, supra, on corresponding interstate traffic.

These findings are without prejudice to the right of the authorities of the State of Idaho or of any other party in interest to apply in the proper manner for a modification of our findings, and order if one is issued, as to any specified intrastate rate on the ground that the latter is not related to interstate rates in such a way as to contravene the provisions of the interstate commerce act.

Ores and concentrates have been omitted from this finding because it appears that they move in this western territory largely for short distances and largely intrastate, and that the condition of the industry and competitive transportation conditions are such that it is improbable that respondents would profit from the increase. We are [fol. 259] fortified in this conclusion by the fact that the Arizona carriers have seen fit to abandon any attempt, with the help of our jurisdiction, to apply the surcharge to the rates on ores and concentrates within that State. The industry in western territory is broadly competitive, and the traffic ought not to be subject to increases in one State which are abandoned by the carriers in another. It is assumed that the carriers will withdraw any surcharges which they may now levy on traffic in ores and concentrates moving interstate, or intrastate in other States.

Part 4—Kentucky

The Kentucky Railroad Commission denied application of the surcharges in their entirety.

The class rates applicable between points in Kentucky, with certain exceptions, are the distance-scale rates which we prescribed on interstate traffic within the South in the southern class-rate revision. Rates from and to south-bank Ohio River cities are the same as those applicable

from cities on the opposite bank and reflect the interterritorial basis then prescribed. Rates between points in official territory and border points in Kentucky, which are on the distance-scale basis prescribed in the eastern class-rate revision, apply over routes through Kentucky and often are observed as maxima for intermediate intrastate hauls. There are a few so-called lettered class rates in effect in Kentucky, but these are in reality commodity rates. Rates on the line of the Chesapeake & Ohio Railway Company in Kentucky to and from Cincinnati are the distance-scale rates prescribed for central territory in the eastern class-rate revision.

The intrastate rates in Kentucky and the revenue therefrom, along with the intrastate rates and revenues in all other Southern States, were considered in the determination of a proper class-rate level throughout southern territory. There are intrastate rates on more than 125 different commodities which are the same percentages of the first-class rates as apply on the respective commodities for interstate hauls. The surcharges have been added to all interstate class rates, as well as to the class rates applicable intrastate in surrounding States. It was testified that there is a heavy movement of class-rate traffic within Kentucky and between Kentucky and other States, and defendants assert that the refusal to permit the surcharges intrastate results in direct and positive discrimination against interstate traffic and in favor of Kentucky intrastate traffic.

Shippers point out that the interterritorial class rates prescribed in the southern class-rate revision between southern and central territories, and the intrastate class rates applicable in Indiana, are generally lower, with the surcharges added, than the distance-scale rates applicable in [fol. 260] Kentucky without the surcharges. They also offered evidence tending to show that class-rate levels in various States, particularly north of the Ohio River, are lower than in Kentucky, although the traffic density in such States is less than in Kentucky. Evidence of much the same character has been presented in No. 21373, Commonwealth of Kentucky v. Ahnapee & W. Ry. Co., now pending, involving rates to and from Kentucky, from and to official and western trunk-line territories, and will be

dealt with there. The present class rates in Kentucky are in harmony with our previous decisions.

The interstate and intrastate rates on brick from and to points in Kentucky are on the basis prescribed in Brick and Clay Products in the South, 88 I. C. C. 543, 155 I. C. C. 730. The surcharge of 1 cent has been added to the interstate rates. This commodity is manufactured at numerous points in Kentucky and is sold at Kentucky destinations in competition with brick manufactured at various interstate points, particularly Nashville, Tenn., and Evansville, Ind.

Certain manufacturers of fire brick and clay products in Kentucky do not oppose the uniform application of the surcharges on intrastate and interstate traffic, but ask that crude fire clay be subjected to a surcharge of not more than 6 cents a net ton. They contend that it is of no greater value than in any of the articles on which we have authorized a surcharge of 6 cents a ton. This is probably true, but it is also true that the surcharge of 12 cents a net ton on fire clay of any description, which we approved, is the same as that which we approved on the following comparatively low-grade commodities: Rough stone, shale, cobble stones, charcoal, and scrap iron. Upon consideration of an informal petition from fire-clay interests for reduction of the interstate surcharge on crude fire clay to 6 cents a ton, we declined to make any change.

Cement which is manufactured at Kosmosdale, Ky., about 18 miles west of Louisville, Ky., is sold at points in Kentucky in competition with cement manufactured at Speeds and Mitchell, Ind., Osborne, Ironton, and Superior, Ohio, Marquette, Mo., and Nashville and Chattanooga, Tenn. The interstate and intrastate rates on cement from and to points in Kentucky, except from points in official territory to south-bank Ohio River crossings, are distance-scale rates prescribed in Southern Cement Rates, 132 I. C. C. 427, for interstate application within the South and from producing points in central territory to destinations in the South. The surcharge of 1 cent has been added to the interstate rates.

The cement plants at Speeds, 11 miles north of Louisville, and at Osborne, near Dayton, Ohio, secure much of their coal used in the manufacture of cement from the same mines in Kentucky as supply the cement plant at Kosmosdale. The interstate rates on coal have been increased by the sur- [fol. 261] charge of 6 cents a net ton. The plants at Speeds

and Osborne in 1931 shipped several hundred cars of cement to destinations in Kentucky.

Fertilizer manufactured at Louisville is marketed throughout Kentucky in competition with that manufactured at Nashville, New Albany, Ind., and Cincinnati, Ohio. There was a movement of over 100 cars of fertilizer from the Cincinnati district to destinations in Kentucky over the Louisville & Nashville during March and April of 1932. The interstate rates have been increased by the surcharge of 1 cent. Both the interstate and intrastate rates on fertilizer from and to points in Kentucky are, except for the addition of the surcharge to the interstate rates, on the distance-scale basis prescribed in Fertilizer between Southern Points, 113 I. C. C. 389.

Lumber is produced at many points in Kentucky and is sold to furniture manufacturers at Louisville and Frankfort, as well as for general use throughout the State. Rates on lumber from the principal shipping points on the Louisville & Nashville in Tennessee have been on the same level as the intrastate rates on this line to destinations in Kentucky, and the present rate groups have been in existence for many years. There is a considerable production of lumber in the Big Sandy district on the Chesapeake & Ohio in Kentucky. The rate on lumber from this district to Covington, Ky., for many years has been the same as that to Cincinnati. The interstate rates on lumber have been increased by the surcharge of 12 cents per ton. This increase without a corresponding increase intrastate has disrupted the group relations both as to origins and destinations, where points in Kentucky and in an adjoining State are included in the same group.

In Lee Clay Products Co. v. Chesapeake & O. Ry. Co., 167 I. C. C. 630, we found the then existing interstate rates on sewer pipe from Clearfield, Ky., to destinations in southern territory unduly prejudicial to the shipper at Clearfield and unduly preferential of its competitors at Louisville, Frankfort, and Owensboro, Ky., and Cannelton, Ind., and recommended the establishment of rates made 17.5 per cent of the first-class rates for the removal of the undue prejudice. The carriers established the 17.5 per cent basis on sewer pipe moving interstate between the points in the southern region and moving intrastate in Georgia, Kentucky, and North Carolina. In a case before the Kentucky Railroad

Commission, heard jointly with the interstate case, that body approved the 17.5 per cent basis within Kentucky. The interterritorial rates on sewer pipe between official and southern territories are 25 per cent of the corresponding first-class rates. All interstate rates on sewer pipe have been increased by the surcharge of 2 cents.

[fol. 262] A manufacturer of sewer pipe, flue lining, and related products at Clearfield asks that the rates on these commodities be excepted from any order requiring the addition of the surcharge to Kentucky intrastate rates. The intrastate rates on sewer pipe in Ohio and Indiana are lower than the interstate rates applicable throughout central territory, and the Kentucky intrastate rates without the surcharge are higher for distances beyond 100 miles than the rates applicable for the same distances intrastate in Ohio, Indiana, Tennessee, Alabama, Georgia, and North Carolina, with the surcharges included.

The interstate rates on sand, gravel, crushed stone, and similar materials in southern territory and the intrastate rates in most southern States, including Kentucky, are the distance-scale rates prescribed in Rates on Chert, Clay, Sand, and Gravel, 122 I. C. C. 133. We also prescribed these distance-scale rates on sand and gravel from Cleves, Ohio, to Independence and Butler, Ky. All interstate rates and the intrastate rates in adjoining States have been increased by the surcharge of 6 cents a net ton. Sand and gravel is shipped to points in Kentucky from Nashville and Johnsonville, Tenn. Crushed stone is shipped from Franklin and Mascot, Tenn. Shippers at these points compete with producers of sand and gravel located at Louisville and Carrollton, Ky., and with producers of crushed stone located at Frankfort, Lexington, Russellville, Clermont, Mount Vernon, Upton, Bombey, Dungan, Yellow Rock, Hopkinsville, and Tyrone, Ky.

The class 7 rates prescribed in the southern class-rate revision apply on leaf tobacco intrastate in Kentucky. This basis was prescribed by the Kentucky commission. Class 6 rates apply generally on leaf tobacco for interstate hauls from and to points in Kentucky and have been increased by the surcharge of 1 cent. Shippers state that the intrastate rates are 34.44 per cent of first-class rates, whereas the intratate rates in Virginia are 29.91 per cent of the first-class rates. During the months of March and September,

1931, there was a movement of 4,701,200 pounds of leaf tobacco at intrastate rates and 9,118,000 pounds at interstate rates from and to points in Kentucky, on or via the line of the Louisville & Nashville.

There was a movement of over 2,000,000 tons of coal from mines on the Louisville & Nashville in Kentucky to destinations in Kentucky during 1931. Most of this coal moved over intrastate routes. However, coal from some mines in Kentucky moves over interstate routes to destinations in Kentucky. Rates from coal mines in Kentucky and the adjoining States have been grouped for many years and the relation between the groups has been determined by the quality of coal produced and distance to common markets. The Jellico-Middlesboro group extends from Corbin, Ky., south on the Louisville & Nashville to Morley, Tenn., and [fol. 263] southeast to Blackmont, Ky., and Cumberland Gap, Tenn. The rate has been the same from all points in this group to Louisville since 1893. The failure of the Kentucky commission to authorize the surcharge has disrupted this group so far as coal moving to Kentucky from the Tennessee mines is concerned.

The rates on coal from the LaFollette and Windrock groups in Tennessee, and the Harlan-Benham, Hazard, and McRoberts groups in Kentucky, and the Appalachia group in Virginia have been the same differentials under or over the Jellico-Middlesboro group since 1918. Prior to 1918, the rates from mines in western Kentucky to destinations in Kentucky were 10 cents a ton higher than those from the Booneville group in Indiana. Due to higher percentage increases in official territory, the rates from the Indiana mines became higher than those from Kentucky, but were reduced by the carriers to the same level as the Kentucky rates. There was a movement of 1,701 cars of coal from Indiana mines to Louisville over the Southern in 1931.

The rates from the Kanawha group on the Chesapeake & Ohio in West Virginia to Louisville and Lexington have always been the same as those from the Big Sandy group in Kentucky. The mines outside of Kentucky which have been accorded a rate parity with Kentucky mines to Louisville and other important consuming centers in the State in most instances have an advantage in distance. The Kentucky intrastate rates are usually lower for similar distances than rates from the same mines to interstate desti-

nations in southern territory. The failure to apply the surcharge on Kentucky intrastate traffic has increased the differentials 6 cents a ton to Kentucky destinations in favor of Kentucky mines, and has disrupted established groups where points in Kentucky and in adjoining States are included in the same group.

The relation existing January 3, 1932, between the rates on coal from the various groups in eastern Kentucky, Tennessee, and southwest Virginia to south-bank Ohio River cities and those from the same groups to New Albany, Jefferson, and Evansville, Ind., and Cincinnati have been in effect for many years and in some instances have been approved by us or by the Kentucky commission. All of the interstate rates have been increased by the surcharge, except rates from the New Albany and Kanawha groups on the Chesapeake & Ohio in West Virginia to Cincinnati, Covington, Newport, and some intermediate points. These rates were made to enable the producers in West Virginia to compete with producers on the line of the Louisville & Nashville in Kentucky and Tennessee, and for that reason the surcharge has not been applied.

[fol. 264] Coal operators in Kentucky contend that the coal industry in that State is in a worse financial plight than the railroads. The coal production in Kentucky for the first three months of 1932 was 39 per cent less than the production for the same period in 1930. The operators assert that the addition of surcharges to coal rates will cause certain manufacturers now using large quantities of coal to substitute gas as a fuel or to use hydroelectric power. Similar allegations were made by coal operators in various parts of the country in Ex parte No. 103, and were considered in reaching our conclusions.

The Louisville & Nashville, on the basis of traffic handled during March and September, 1931, estimates that it would collect $182,739 additional annual revenue if the surcharges were applied to Kentucky intrastate traffic. It allots to itself, in this estimate, 50 per cent of all interline charges collected. The Chesapeake & Ohio, on the basis of the traffic handled during March, 1932, estimates that it would receive $42,812 additional annual revenue. The Illinois Central Railroad Company estimates that it would receive $84,022 more per year, and the Southern Railway Company and Cincinnati, New Orleans & Texas Pacific Railway Company

estimate that they would receive about $19,600 a year additional.

Shippers refer to the annual reports of the respective carriers operating in Kentucky to show that the latter have received aid from the Reconstruction Finance Corporation and that they have further benefited by reductions in salaries and wage scales. They contend that any necessary relief should come from these sources, because an increase in the rail rates will divert the traffic. Motor trucks now handle foodstuffs, hardware, clothing, and other merchandise in considerable volume throughout Kentucky.

Certain Kentucky interests presented data to show that in various States, including Alabama, Florida, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and Ohio, the surcharges have not been permitted to be applied intrastate on all of the descriptions of traffic upon which they were authorized interstate, and that no petitions seeking the institution of section 13 proceedings with respect to these States have been filed. It is contended that there is no more reason for requiring Kentucky shippers to pay the surcharges on their intrastate traffic than shippers of the commodities which have been excepted from the surcharges in the other States mentioned.

We find that in view of the surcharges which have become effective interstate in the freight rates on the classes and commodities here in question, under our findings in Fifteen Per Cent Case, 1931, supra, respondents' intrastate rates in Kentucky on the same classes and commodities, to which [fol. 265] no corresponding surcharges have been added, have resulted and will result in unjust discrimination against interstate commerce. We further find that this unjust discrimination shall be removed by applying to the present intrastate rates in Kentucky on said classes and commodities the same surcharges as are and for the future may be contemporaneously maintained by respondents, in accordance with the findings in Fifteen Per Cent Case, 1931, supra, on corresponding interstate traffic.

These findings are without prejudice to the right of the authorities of the State of Kentucky or of any other interested party to apply in the proper manner for a modification of our findings, and order, if one is issued, as to any specified intrastate rate on the ground that the latter is not

related to interstate rates in such a way as to contravene the provisions of the interstate commerce act.

Part 5—Louisiana

The Louisiana Public Service Commission authorized the surcharges on intrastate carload rates, except those on sand, gravel, shells, crushed stone, and similar road-building materials; salt cake; fertilizer and fertilizer materials; cottonseed cake, meal, bran, hulls and meats; bagasse; pulpwood; stave bolts; sugarcane, raw and refined sugar; sweetpotatoes; fresh vegetables; pulverized limestone; waste wood; secondhand sugar bags; waste paper; soya beans, velvet beans, Austrian winter peas and cow peas; rosin sizing; potash nitrate; sirup and molasses; blackstrap molasses; crude fire clay; clay, n. o. i. b. n.; charcoal; and bolts. It also excepted all less-than-carload rates.

It is estimated that, based on the traffic of 1931, the application of the surcharges on the excepted commodities would produce additional annual revenue of $26,420 to the Gulf Coast Lines, $53,470 to the Missouri Pacific Railroad Company, $1,848 to the New Orleans & Lower Coast Railroad Company, $108,442 to the Texas & New Orleans Railroad Company, $92,198 to the Texas & Pacific Railway Company, $12,493 to the Kansas City Southern Railway Company, and $101,798 to the Illinois Central. The Louisiana & Arkansas Railway Company would receive $37,911 additional revenue on sand, gravel, and crushed stone. Railroad traffic men expressed the opinion that, notwithstanding possible diversions of traffic to other transportation agencies, the addition of the surcharges to the intrastate rates would produce an increase in revenue.

The rates on sand, gravel, crushed stone, and related commodities from points in Arkansas and Texas to destinations in Louisiana and between points in Louisiana west of the Mississippi River are the distance-scale rates prescribed in Sand, Gravel, Crushed Stone, and Shells, 155 I. C. C. 247. The rates for interstate hauls to destinations [fol. 266] in Louisiana east of the Mississippi River are the distance-scale rates approved in Sand, Gravel, Slag, Stone, and Chert, 165 I. C. C. 731. The Louisiana commission recently approved, with certain exceptions, the establishment on June 1, 1932, of the same intrastate rates east of the Mississippi River that were and are applicable in

the territory west thereof. All of the interstate rates have been subjected to the surcharge of 6 cents per net ton.

Sand and gravel producers shipping from Reader, Ark., on the Reader Railroad, about 70 miles from the Louisiana border, via that line and the Missouri Pacific, from Lewisville, Ark., on the St. Louis & Southwestern, about 30 miles from the Louisiana border, and from Wilton, Ark., on the Kansas City Southern, about 50 miles from the Louisiana border, state that the assessment of the surcharge on shipments of sand and gravel from Arkansas to Louisiana destinations but not on intrastate shipments has caused them to lose business in Louisiana. Formerly these producers shipped about 50 per cent of their production to Louisiana points. The plant at Reader shipped 370 cars to such destinations during the three months ended January 4, 1932, and only three cars during the three following months. A contract with a contractor in Louisiana was canceled because of failure to agree as to who should pay the surcharge. However, the decline is not due entirely to the interstate surcharge, for the Louisiana Highway Commission discontinued the construction of new roads in December, 1931.

The State Highway Department of Louisiana maintains about 14,000 miles of highway and this work requires many cars of gravel, crushed stone, crushed shell, etc., each year. Due to an increase in the rates on gravel in Louisiana west of the Mississippi River in October, 1929, the highway commission has used trucks and barges whenever feasible to transport these commodities. Hard-surface highways parallel every railroad in Louisiana and the southern part of the State is honeycombed with navigable streams on which barges operate. The State Highway Commission proposes to divert additional tonnage to trucks and barges if the surcharges are added to the present rates.

Sugarcane moves almost entirely intrastate in Louisiana, and there is no interstate movement of bagasse. At the hearing it was stated for the Louisiana commission that the surcharge would increase the rate on sugar for the intrastate haul from New Orleans and certain other points to Shreveport from 39 to 41 cents, whereas the Louisiana & Arkansas was then seeking permission to reduce this rate to 20 cents. Competitive conditions have caused certain car-

riers operating in Louisiana to establish pick-up and delivery service at greatly reduced rates on some commodities.

[fol. 267] The use of fertilizer on Louisiana farms has been greatly curtailed because of the financial condition of farmers. The tonnage used on Louisiana farms during the 1929-1930 season was 185,145 tons, and this declined to 96,168 tons during the 1930-1931 season and to 51,180 tons during the 1931-1932 season. Cottonseed and cottonseed products sold during the 1931-1932 season for one-third or less of the price received in the 1929-1930 season. The price of these products is on a delivered basis and all transportation costs are borne by the farmer. It is contended that the addition of the surcharge will further curtail the use of fertilizer and will cause the cottonseed to be left on the farm, eliminating entirely the transportation of both commodities.

There has been an increase in the amount of fresh vegetables produced and marketed in Louisiana during the past few years, but the tonnage of fresh vegetables delivered by the railroads has declined. This tonnage has shifted to other methods of transportation. Sweetpotatoes are an important crop in Louisiana, and it is contended that it is discriminatory to assess a surcharge on sweetpotatoes when other potatoes are exempted from such charges.

There is nothing of record which warrants the conclusion that the situation as to fertilizer, cottonseed, cottonseed products, fresh vegetables, or sweetpotatoes is different in Louisiana from what it is in other parts of the country, or in surrounding States, where surcharges are now being assessed. Similar allegations with respect to the probable effect of truck competition and as to the inability of various commodities to stand any increase, were made in Ex parte No. 103 and were considered in reaching our conclusions. Nor is there anything to show that the movement of sweetpotatoes will be adversely affected by the application of a surcharge thereon without a similar charge on other potatoes.

We find that in view of the surcharges which have become effective interstate in the freight rates on the classes and commodities here in question, under our findings in Fifteen Per Cent Case, 1931, supra, respondents' intrastate rates in Louisiana on the same classes and commodities, to which no corresponding surcharges have been added, have

resulted and will result in unjust discrimination against interstate commerce, except in the case of the intrastate rates on sugarcane. We further find that this unjust discrimination shall be removed by applying to the present interstate rates in Louisiana on the said classes and commodities, except sugarcane, the same surcharges as are and for the future may be contemporaneously maintained by respondents, in accordance with the findings in Fifteen Per Cent Case, 1931, supra, on corresponding interstate traffic. [fol. 268] These findings are without prejudice to the right of the authorities of the State of Louisiana or of any other interstate party to apply in the proper manner for a modification of our findings, and order if one is issued, as to any specified intrastate rate on the ground that the latter is not related to interstate rates in such a way as to contravene the provisions of the interstate commerce act.

Sugarcane is excepted because sugar beets were excepted from interstate surcharges in Fifteen Per Cent Case, 1931, supra. The failure also to except sugarcane was an inadvertence. Its movement is practically all intrastate within Louisiana, but if the surcharge has been applied to any interstate movements, respondents will be expected to eliminate it.

Part 7—Montana

The Board of Railroad Commissioners of Montana refused to allow the surcharges on any intrastate traffic. Respondents roughly calculate, on the basis of the estimated intrastate traffic of Montana in 1930, that this refusal is depriving them of more than $257,000 per year. On the basis of more exact data for the first three months of 1932, equated to a year, indicating that Montana intrastate traffic has fallen off about 40 per cent since 1930, they estimate the yearly loss at about $150,000. This is compared with $3,000,000 per year, the estimated increase in revenue accruing to the Montana lines from all the surcharges which have been permitted interstate and intrastate in the territory which they serve.

Two scales of class rates apply intrastate in Montana. There is a distributing scale from jobbing points and another, 10 per cent higher, for general application from and to other points. Except for the general percentage increases and reduction of recent years, the former is the same

as that prescribed in Portland Chamber of Commerce v. O. R. R. & N. Co., 21 I. C. C. 640, for application from north Pacific coast points to the interior as far east as Montana. This scale moves most of the class-rate traffic in Montana. For 1-line hauls, which predominate, and in the case of the higher classes, at least, it is generally lower, up to 340 miles, than Scale III, prescribed in Western Trunk-Line Class Rates, 164 I. C. C. 1, and which applies just east of the Montana-North Dakota State line. Failure of the State to permit application of the surcharges widens the existing disparities against interstate traffic.

In Rates on Petroleum and its Products in Montana, 176 I. C. C. 707, decided July 13, 1931, we found that the intrastate rates on refined and low-grade petroleum products, not including crude petroleum, prescribed by the Montana commission in its Docket No. 1020 resulted and would result in [fol. 269] undue preference and advantage to shippers of intrastate traffic within Montana, in undue prejudice to shippers of interstate traffic from points in Wyoming to points in Montana, and in unjust discrimination against interstate commerce; also that said preference, advantage, prejudice, and discrimination could and should be removed by the establishment of rates for intrastate application in Montana which should not be lower for corresponding distances than the rates on the respective commodities contemporaneously in effect from Casper and Cody, Wyo., to points in Montana. The State commission later authorized the same scale of rates for intrastate application as we prescribed interstate. At present the surcharge of 1 cent applies interstate, but not intrastate, and the relative parity which our decision contemplated has been destroyed. There is a substantial movement of petroleum products intrastate and interstate on these rates.

In Western Coal Rates, 80 I. C. C. 383, decided June 15, 1923, we had before us the relations between certain Montana intrastate rates and certain interstate rates from Wyoming mines to Montana destinations. We found that the rates on lump coal from Sheridan, Wyo., to points in Montana on the line of the Northern Pacific east and west of Billings, Mont., and on the line of the Great Northern on traffic routed via Billings, were not unreasonable, but for the future would be unduly prejudicial to Sheridan and unduly

preferential of Red Lodge, Mont., to the extent that they exceeded by more than specified amounts the rates contemporaneously in effect from Red Lodge. We further found that the rates from Kirby, Wyo., to destinations on the Northern Pacific and Great Northern were not unreasonable, but for the future would be unduly prejudicial to Kirby to the extent that they exceeded by more than a specified amount the contemporaneous rates from Red Lodge to the same destinations. Since January 4, 1932, the application of the surcharge to the interstate rates has made the differentials against the Wyoming mines 6 cents per ton greater than those prescribed. The movement interstate and intrastate from these competing producing points is heavy. Montana coal is meeting increasing competition from natural gas.

Sugar shipped from San Francisco, Calif., and Wyoming points to Montana destinations competes with sugar sold at the same figures and moved intrastate from Montana producing points. Lumber shipped from Idaho and Washington competes in Montana with lumber moved intrastate from Montana points. Application of the surcharges on only interstate traffic gives the intrastate traffic a new advantage.

[fol. 270] The Anaconda Copper Mining Company opposes the surcharges sought on its products. Prices of nonferrous metals have reached a very low state. The industry is in a depressed financial condition; mining, smelting, and refining operations are at low ebb; many plants are closed down and thousands of employes are out of work. Business is being conducted at a loss and any increase in freight charges will, it is asserted, result in greater deficits. This protestant is particularly interested in avoiding the increase of 10 per cent in the rate on its movement of ore and concentrates from mines in and about Butte, Mont., to its smelter at Anaconda, Mont., about 24.5 miles away, on the average, over the line of the Butte, Anaconda & Pacific Railway. This railroad, however, is controlled by the Anaconda company, and an increase in its revenue would accrue to the advantage of the latter. Protestant submitted numerous comparisons to show that the intrastate rates on ore and concentrates are not low, compared with corresponding interstate rates.

Protestant ships large quantities of copper bullion from Anaconda to its refinery at Black Eagle, Mont., a distance of

201 miles, over the line of the Great Northern. The rate is $2.50 per ton. The surcharge would make it $2.75, except that on shipments accorded transit there would instead be the 40-cent surcharge which is now applied to the through interstate movement in and out of Black Eagle. The total surcharge on the ore and concentrates, bullion and refined copper, considering the three separate movements, would amount to $1.31 per ton of refined copper, of which 40 cents is now levied. Copper rods, produced at Black Eagle, are used in large quantities at Detroit, Mich., and any additional freight charge would make it more difficult for protestant to compete with foreign copper reaching Detroit from Canada or via the New York State Barge Canal. Protestant could close its Black Eagle rod mill and make its rods at Hastings-on-Hudson, N. Y., using water-borne copper. This might result, it is said, in closing the only two mines still in operation at Butte. Utah and Arizona bullion is refined in transit and subject to only one surcharge. There is no intrastate movement of bullion in those States which is subject to an intrastate surcharge. There would be none in Montana if there were a satisfactory transit arrangement in force at Black Eagle. The situation with respect to zinc is similar.

Protestants produce at Anaconda acidulated phosphates, a fertilizer. There are rates thereon of 35 cents to St. Paul, Minn., and Missouri River cities, and 21 cents to Spokane, Wash., the latter being made to meet Canadian competition. [fol. 271] Except for the surcharges, the same rates apply to intermediate points in Montana for comparatively short hauls, subject to the qualification that where the classification basis results in lower rates, that basis applies. In view of the relatively high rates to the Montana points protestant contends that if there is any undue burden, it is on intrastate, rather than interstate, commerce.

The Hansen Packing Company, with a plant at Butte, protests the application of intrastate surcharges on packing-house products, on the ground that they would make it more difficult to compete with packers who ship into the State. High freight rates and long hauls practically exclude protestant from important markets outside the State.

We find that in view of the surcharges which have become effective interstate in the freight rates on the classes and commodities here in question, under our findings in Fifteen Per Cent Case, 1931, supra, respondents' intrastate rates in

Montana on the same classes and commodities, to which no corresponding surcharges have been added, have resulted and will result in unjust discrimination against interstate commerce, except in the case of the intrastate rates on ores and concentrates. We further find that this unjust discrimination shall be removed by applying to the present interstate rates in Montana on the said classes and commodities, except ores and concentrates, the same surcharges as are and for the future may be contemporaneously maintained by respondents, in accordance with the findings in Fifteen Per Cent Case, 1931, supra, on corresponding interstate traffic.

These findings are without prejudice to the right of the authorities of the State of Montana or of any other interested party to apply in the proper manner for a modification of our findings, and order if one is issued, as to any specified intrastate rate on the ground that the latter is not related to interstate rates in such a way as to contravene the provisions of the interstate commerce act.

The reasons for exempting ores and concentrates are the same as those stated in the case of the Idaho rates.

Part 8—Nebraska

The Nebraska State Railroad Commission denied respondents authority to apply the surcharges on the following commodities: 1. Sand and gravel, other than glass or molding; 2. Stone, broken, ground, or crushed; 3. Common brick, face brick, hollow tile or building tile brick, n. o. s. A statement of the intrastate tonnage of these commodities in Nebraska for the year 1931, and the estimated additional reve- [fol. 272] nue that would accrue to respondents if the surcharges were added is as follows:

Commodity	Nebraska intrastate tonnage 1931, tons	Estimated[1] additional revenue
Sand and gravel (other than glass or molding)	1,775,140	$106,508.40
Stone, broken, ground, or crushed	26,174	1,570.44
Common brick	24,726	4,945.20
Hollow tile or building tile brick, n. o. s. face brick	15,987	3,197.40
Total	1,842,027	116,221.44

[1] The surcharge is 6 cents per ton on sand, gravel, and stone, and 1 cent per 100 pounds on the other articles.

Throughout Nebraska, except the extreme western portion thereof, there are extensive sand and gravel deposits, either in the rivers or as the result of glacial deposits.

Within the last two years respondents have been required to meet very severe truck competition between points in the State, especially from roadside pits and river banks.

Respondents' lines are largely paralleled by hard-surfaced roads. Prior to 1930 they experienced no great difficulty in maintaining their so-called standard sand and gravel rates in Nebraska, but in the early part of that year truck competition became so keen that they sought authority of the Nebraska commission to reduce the rates on these commodities, as well as on crushed stone, between certain points in the State. The so-called standard scale of sand and gravel rates in the State had its inception in 1920-1921, when the intrastate rates were established in consequence of Nebraska Rates, Fares, and Charges, 60 I. C. C. 305. Subsequently the order in that case was relaxed and the scale of rates on sand and gravel within the State became a matter of agreement or compromise between sand and gravel shippers, the Nebraska railroads, the State commission, and this commission. This standard scale is also applicable between Nebraska points, on the one hand, and Kansas and Missouri, on the other, except that the surcharge of 6 cents per ton has been added on the interstate traffic.

Certain reduced emergency rates on sand and gravel and crushed stone were established by respondents in Nebraska to meet truck competition in the early part of 1931, to expire December 31, 1931, but the truck competition became so keen that the period for their retention was extended to December 31, 1932. These emergency rates are substantially lower than the standard scale. For 50 miles the latter scale is 70 cents, whereas the emergency scale is 50 [fol. 273] cents per ton. Before respondents may establish intrastate rates they must receive authority from the Nebraska commission. These emergency rates on sand and gravel, as well as on crushed stone, were established upon application of respondents to the Nebraska commission, and respondents desire to retain them, believing them necessary to meet truck competition. They are restricted to single-line hauls, and, with a few exceptions, no switching charges are absorbed in connection with them. Most of them apply for relatively short hauls. We may, therefore, consider that respondents have withdrawn their petition in so far as it relates to authority to increase the so-called

emergency rates on sand and gravel, as well as on crushed stone, now applicable between points in the State.

In all other instances, where the standard State scale on sand, gravel, and crushed stone applies, respondents insist that they should be permitted to increase their rates by the surcharge, as has been done on interstate traffic. There is an interstate movement of sand and gravel and also crushed rock or stone from Kansas to Nebraska and, to some extent, from Missouri to Nebraska. In 1931 the Chicago, Burlington & Quincy Railroad Company transported from Nebraska to interstate destinations 5,031 carloads of sand and gravel. The majority of the hauls in the State by truck are less than 20 miles, whereas the nearest sand and gravel pit in many instances is 75 miles by railroad. Respondents seek to apply the surcharges to the rates for these longer distances.

A witness testified that he shipped 666 carloads of sand and gravel from Hanover, Kans., to Nebraska destinations in 1931. Since the surcharge was added to these rates this shipper has not been able to ship a single carload into Nebraska. Some of his competitors are located at Endicott and Fairbury, Nebr. He testified that during the month of April, 1932, contracts for the purchase of approximately 1,250 carloads of sand and gravel were consummated in Nebraska territory which formerly has been regarded as competitive, but that his company did not receive orders for any of this material, although its sand and gravel is similar to that produced in Nebraska.

Stone, broken, ground, or crushed, competes with sand and gravel in road building, and what has been said with respect to sand and gravel applies with equal force to stone.

The State brick scale applying on the uniform brick list is the same as prescribed in Ballou Brick Co. v. A., T. & S. F. Ry. Co., 77 I. C. C. 4, for single-line application from Sioux City and Sargents Bluff, Iowa, to destinations in Nebraska. The finding in that case prescribed rates consistent with those in Mason City Brick & Tile Co. v. Director General, 77 I. C. C. 22, for application on brick from [fol. 274] Mason City and near-by Iowa points to destinations in Nebraska. The two cases last mentioned were reopened, consolidated, and resulted in the fixing of a uniform scale to Nebraska destinations from producing points

in Illinois, Iowa, and Kansas, in Mason City Brick & Tile Co. v. Director General, 107 I. C. C. 702. The basic scale was made applicable in that case for both single-line and joint-line hauls, and for single-line hauls varied from 0.5 cent under to 0.5 cent over the Ballou brick scale, except that the rates were the same for single-line hauls for distances of from 150 to 250 miles. One cent is added for joint-line hauls in the Ballou scale. At the time of the decision of the Ballou case, respondents applied to the Nebraska commission for authority to establish that scale on intrastate traffic, such authority was granted, and this scale of rates, as stated, is now in effect between points in the State.

The rates applicable on the uniform brick list also apply on hollow tile or building tile, and there is a substantial movement of these commodities in interstate commerce, principally to Nebraska.

The rates on common brick were likewise treated in the manner indicated in the cases cited, and the Ballou scale adopted in Nebraska. The present rates prescribed on interstate traffic to Nebraska in the second Macon City Brick cause, supra, for single-line and joint-line hauls are 0.5 cent higher than applicable for single-line hauls between points in Nebraska for distances as high as 150 miles, at which distance the rates are identical. One cent is added to the State rates, based on the Ballou scale, for joint-line hauls. No rates were prescribed on common brick for distances beyond 150 miles in the Mason City Brick & Tile case. If the surcharges were added to the intrastate single-line rates, those rates would still be lower than the interstate scale, whereas if the surcharges were added to the joint-line intrastate scale, the total rates would result for most distances in rates substantially the same as the present interstate rates. Brick is hauled by truck for distances which rarely exceed 50 miles and ordinarily are not in excess of 35 miles. The Nebraska commission denied the increase on brick and related articles on the ground that they are competitive with sand and gravel. While there is some competition between brick and sand or gravel, we have never considered such competition as requiring any fixed relation between the rates on the respective commodities. There is nothing of record here to warrant a change in this respect.

We find that in view of the surcharges which have become effective interstate in the freight rates on the commodities

here in question, under our findings in Fifteen Per Cent Case, 1931, supra, respondents' intrastate rates in Nebraska [fol. 275] on the same commodities, to which no corresponding surcharges have been added, have resulted and will result in unjust discrimination against interstate commerce, with the exception of the so-called emergency rates on sand, gravel, and crushed stone. We further find that this unjust discrimination shall be removed by applying to the present intrastate rates in Nebraska on the said commodities, except the so-called emergency rates on sand, gravel, and crushed stone, the same surcharges as are and for the future may be contemporaneously maintained by respondents, in accordance with the findings in Fifteen Per Cent Case, 1931, on corresponding interstate traffic.

These findings are without prejudice to the right of the authorities of the State of Nebraska or of any other interested party to apply in the proper manner for a modification of our findings, and order if one is issued, as to any specified intrastate rate on the ground that the latter is not related to interstate rates in such a way as to contravene the provisions of the interstate commerce act.

Part 9—Oklahoma

This part was heard jointly with a case before the Corporation Commission of Oklahoma.

The State commission denied increases on the following traffic:

1. Petroleum oils, refined and other gasolines, as named in Group No. 450, and fuel, road, and petroleum residual oils, as named in Group No. 451, both of Agent J. E. Johanson's tariff I. C. C. No. 2398, when such commodities are moving for further manufacture.

2. Crude oil and other commodities as set out in Group No. 360 of the same tariff.

3. Cottonseed products, including cottonseed bran, cake, hulls, meal, and meats.

4. Feed, animal or poultry, n. o. i. b. n., where subject to rate applicable upon wheat or corn or when composed of 80 per cent or more of wheat or corn or the products of wheat, corn and/or cottonseed.

5. Less-than-carload traffic, where, the first-class rate is $1.04 or less. Where the first-class rate is in excess of $1.04 and does not exceed $1.23, a surcharge of 1 cent was allowed.

The volume of this Oklahoma intrastate traffic, the surcharges on corresponding interstate traffic, and the amounts by which respondents estimate their revenues would be increased, if the surcharges were applied to the intrastate tonnage for a constructive yearly period, are shown as follows:

[fol. 276]

Commodity	Oklahoma intrastate	Increase[1]
	Tons	
1. Petroleum oil, refined, and other gasolines, and fuel, road, and petroleum residual oils, moving for further manufacture	917,473	$183,494.38
2. Crude oil and other commodities, as set out in Group 360	312,913	62,583.60
3. Cottonseed bran, cake, hulls, meal, and meats, enumerated in Group 101	35,071	7,014.17
4. Feed, animal or poultry, n. o. i. b n., Group 701	4,456	891.10
5. Less-than-carload traffic:		
A. Where the first-class rate is $1.04 or less	64,564	25,826.26
B. Where the first-class rate is in excess of $1.04 and does not exceed $1.23	4,983	996.54
	1,339,460	280,806.05

[1] The surcharge is 1 cent per 100 pounds on all the groups except 5 A, on which it is 2 cents.

The yearly period of movement selected by respondents was not uniform, but the tonnage shown moved generally in 1930 and 1931.

There is a considerable rail movement of petroleum oils, State and interstate. Pipe lines parallel practically all of the rail lines in Oklahoma and carry a large portion of the crude oil.

A witness for the State commission testified that numerous intrastate rates on petroleum and its products for further manufacture have been reduced by respondents, and that the reasons assigned for asking permission to make the reductions were "surplus production," "pipe line competition," "insufficient storage," "flush production," "to avoid the construction of pipe lines," "to get business for Oklahoma City refineries," "all the traffic can bear," "to make a market," and "because the refinery is not in a position to crack the stock." For example, a rate of 13 cents prescribed as reasonable by the Oklahoma commission on kerosene or naphtha (gasoline), forwarded for the purpose of being impregnated with a higher gravity product, from Ardmore, Okla., to Healdton and Ringling, Okla., was reduced to 5 cents "to meet pipe-line competition." Other similar examples are shown.

Oil shippers of Oklahoma appointed a committee consisting of representatives of the principal refineries of the State to present evidence in this proceeding. A member of this committee, an experienced operator, explained the reasons for moving "cracking stock" from one refinery to another. The smaller refineries, not equipped with adequate facilities, merely skim the oil, and unless it is then moved to another refinery equipped to apply the higher heat, it must be sold at local points as fuel oil, road oil, or some other like commodity. He further explained that the blending of high-grade, with low-grade gasoline could be accomplished at almost any point. He testified that if the surcharge were imposed on this traffic, steps would be taken to avoid intermediate shipments for mixing or blending, and these processes would then take place at final destination.

[fol. 277] The chairman of the committee testified that if the surcharge were applied on intrastate shipments, his company might purchase trucks equipped to handle natural gasoline from the Oklahoma City field to Cyril, Okla., for blending, and to carry a return load of marketable gasoline to Oklahoma City. Many movements of natural gasoline now take place by pipe lines, and more of the pipe lines which now transport other kinds of oil can be adapted to this use if need develops. This same witness testified that the surcharge would in a sense be collected twice on this class of traffic, once into the refining point, and then on the separate shipment of the refined product outbound to the consuming point. He showed that on 171,000 gallons of gasoline, about 10 per cent of which was natural gasoline which moved from Oklahoma City to Cyril for blending, a saving of $304 in freight would have resulted had the stock been blended at Oklahoma City. He further stated that the practice of blending at destination would be attempted if the surcharge is added. His company ships 35 carloads of gasoline per day, and if the practice of blending the stock at destination were adopted on all these shipments, there would be a loss of revenue to the carriers of $150,000 annually.

Fifteen of the principal refineries of Oklahoma answered a questionnaire sent out by the State commission, indicating that five of them are now shipping natural gasoline for blending at destination. Nine of them stated that an in-

crease in the present intrastate freight rates would cause them to seek other methods of transportation or install vapor-recovery systems at their refineries and thus save transportation costs to other refining points. At present 10 of the 15 receive their natural gasoline by rail; the remainder receive it by pipe line or truck.

Another member of the committee, representing a large refinery, testified that from January to October, 1929, his company was in the market for cracking stock to move from Cushing to Ponca City, but respondents' so-called normal rates were too high to attract the traffic, so that 1,390 carloads were transported through pipe lines from and to the points named. On March 17, 1930, respondents established a rate of 7 cents to attract this and since then the shipments have moved from Cushing to Ponca City by rail. Other instances are given where respondents reduced the rates to attract the traffic.

A witness representing an oil refinery at Ponca City testified that a very low rate of 12.5 cents was estabished last year from Oklahoma City to Ponca City on casing-head gasoline for further manufacture, but that his company had used tank wagons for transporting it from and to these points, as well as from Tallant, Okla., and Wichita and Arkansas City, Kans., to Ponca City. He testified that if [fol. 278] the carriers increase their intrastate rates, his company will use pipe lines and trucks to a greater extent than at present.

Another oil shipper, located at Tulsa, testified that it is possible for his company to increase the recovery of casinghead gasoline to the extent of 25 per cent, or approximately 13,000,000 pounds per year; that this is equivalent to $15,840 freight charges which his company is now paying for the transportation by rail of casinghead gasoline from the Oklahoma City field; and that the application of the surcharge might result in the carriers losing the freight charges in their entirety. Another testified that all casinghead gasoline to his plant at Ponca City is now moving by pipe line.

Crude oil moves by rail between points in Oklahoma, as well as to refineries outside of the State. Respondents' witness, after thorough investigation, testified that, in his best judgment, the addition of the surcharge to intrastate rates would increase their revenues.

The oil shippers of Oklahoma testified that, because of the numerous pipe lines in the State and the relatively lower charges for transportation by that means, crude oil will not move by rail except at a very low rate. Most of the crude oil between points in the State now moves by pipe line. Respondents reduced their normal rate of 12 cents, fixed as reasonable by the State commission from Oklahoma City to Ponca City, to 5 cents, and yet this low rate did not regain this traffic. Respondents also reduced their normal rates on crude oil from Oklahoma City to Blackwell, Okla., from 13 cents to 5 cents, and from Oklahoma City to Cushing, Okla., from 11 cents to 4.5 cents, representing to the State commission that these lower rates were all the traffic would bear. Witness for the oil shippers testified that any increase in these lower rates will, as represented by the respondents when they were established, divert the traffic to the pipe lines or trucks.

The chairman of the committee, also representing two large oil refineries in Oklahoma, testified that in 1931 more than 500 carloads of crude oil were shipped from Oklahoma City to Cyril, Okla., but that in the first four months of 1932 only 16 carloads were so shipped and they represented crude oil not profitably salable to the pipe lines. The diversion of this crude oil to the pipe lines, it is testified, was due to the fact that a lower rate was thus obtained than the rate of 5 cents maintained by respondents from and to these points. This witness further testified that all of the cars used for the 500 shipments in 1931 were loaded back with fuel oil through Oklahoma City, thus giving respondents a loaded haul in both directions, which, it is estimated, saved approximately 65,000 empty-car miles.

Another member of the committee, also representing a large oil refinery, testified that his crude-oil shipments from [fol. 279] Borger, Tex., to Ponca City were discontinued upon the application of the surcharge, as it was found cheaper to secure oil from Oklahoma fields by pipe line. Similar testimony was given with respect to residuum oil. The major oil companies of the State make a practice of "trading" crude oil to avoid transportation costs. All crude oil now received at Ponca City is transported by pipe line. Residuum oil to Ponca City also moves extensively by pipe line.

On cottonseed bran, cake, hulls, meal, and meats we approved a surcharge of 1 cent. The State commission denied a like increase, because we did not approve any surcharge on flaxseed meal, corn meal, and like commodities which are used as feeds in competition with cottonseed products. Cottonseed products originate at mills in the State, as well as at mills in Arkansas and Texas, and move regularly in intrastate and interstate commerce.

A witness representing all of the cottonseed-oil mills in the State made an investigation by means of a questionnaire to ascertain the methods used in transporting cottonseed products. One of the principal mills moved 2,307 tons of cottonseed cake and meal by truck and 1,642 tons by rail in 1932 up to March 23. All of the rail shipments except one were to destinations outside Oklahoma. This same witness testified that, when the weather is clear and the roads in good condition, deliveries can be made by truck to all points in the State.

Experienced witnesses dealing in cottonseed meal and cake testified that there is keen competition between cottonseed products, on the one hand, and grain products, on the other. No surcharge was placed on interstate shipments of grain products.

A heavy movement of cottonseed products now takes place in Oklahoma by truck, and it is testified that any increase in the freight rates on these products would result in heavier movements by truck and consequent decrease in revenue for the carriers, or else the substitution of corn, corn meal, flaxseed meal, linseed meal, and similar feeds on which no increase was authorized. Protestants urge that respondents' exhibit showing a loss of $7,014.17 because of the failure to apply the surcharge on cottonseed products is without good foundation, as much of this traffic would be lost to the rail lines if the surcharge were applied.

On feed, animal or poultry, n. o. i. b. n., we authorized a surcharge of 1 cent. The Oklahoma commission authorized the same surcharge, but changed the description of the commodities, making the increase inapplicable to such feeds as are subject to the rate on wheat or corn, and to such as are composed of 80 per cent or more of the products of wheat, corn, or cottonseed. Accurate figures covering the volume of movement of these commodities could not be obtained [fol. 280] and those shown in the foregoing table represent

only a part of this class of traffic on which the surcharge was denied. There is also a substantial interstate movement of this traffic.

Shippers of feed contend that it would be discriminatory to apply a surcharge to mixed feeds generally, so long as none is applied to such feeds composed of grain and grain products. There are many animal and poultry feeds which move at the grain rates and which are composed almost exclusively of grains. Eighty per cent of many of these feeds consists of grain products subject to transit rates, and if the surcharge becomes effective it would not only apply on the 20 per cent of nongrain products but upon the entire weight of the shipment, including the 80 per cent of grain which is not now subject to the increase. In other words, the addition of from 1 to 20 per cent of so-called non-transit commodities to these feeds would result in that percentage paying the increase inbound and again paying it on outbound shipments.

One witness representing a large feed dealer testified that of 19 of the principal mixed feeds manufactured by his company 10, or more than 50 per cent, contain 1 per cent, or less, of nontransit ingredients, and that the increase on the entire mixture would result in an increase upon 99 per cent of the contents which are entitled to transit and no surcharge when moving without the 1 per cent of nontransit tonnage.

It is the practice of feed houses in this territory to ship mixed carloads of mixed feeds, corn, chops, corn meal, and other grain products at grain-product rates, and the application of the surcharge on the mixed feeds containing nontransit commodities will increase the charges on the total carloads to such an extent, it is asserted, that the use of trucks may be encouraged, particularly for distances as great as 150 miles.

Similar contentions as to the competition between cottonseed cake and meal and animal and poultry feeds, on the one hand, and grain products, on the other, were made to us with respect to interstate traffic. Generally speaking, the addition of what protestants refer to as nontransit ingredients results in a product which is of greater value than unmixed grain products, although this is not always the case. Notwithstanding informal requests from various

parties to eliminate the surcharge on animal and poultry feeds on interstate traffic, we have not seen fit to do so and that charge is still applied.

On less-than-carload traffic the interstate surcharge is 2 cents. The State commission denied respondents authority to add the surcharge intrastate on this traffic where the first-class rate is $1.04 or less, and allowed only a 1-cent increase where the first-class rate is in excess of $1.04 and does not exceed $1.23. A distance scale of rates applies on Oklahoma intrastate traffic and is generally the same as [fol. 281] that prescribed in Consolidated Southwestern Cases, 123 I. C. C. 203, 477. Under that scale the first-class rate for 180 miles and over 170 miles is $1.04, and for distances of 260 miles and over 240 miles the first-class rate is $1.23.

Respondents testified that there is a regular movement of less-than-carload merchandise by rail between points in Oklahoma and that a very substantial part of this tonnage moves within the distance limitations mentioned. The same character of traffic also moves from shipping centers in bordering States, Missouri, Kansas, and Texas, to destinations in Oklahoma subject to the surcharge.

Shippers opposing the surcharge show that less-than-carload tonnage has been decreasing materially in Oklahoma ever since 1923. They concede that a large portion of this is attributable to the general shrinkage in railroad traffic, but urge that the great decrease from 1929 to 1931 can not wholly be charged to the depression, as much of the traffic has been diverted to the trucks. Practically every mile of railroad in Oklahoma is paralleled by class A truck lines, i. e., those operating on regular schedules, except in the northern central part of the State. Evidence was introduced to show that the 62 class A truck lines into Oklahoma do not propose to increase their rates for haulage, regardless of any action taken by the railroads.

One shipper testified that in September, 1931, a representative month, his company delivered to five of respondents at Oklahoma City 20,000 pounds of less-than-carload freight; that when pick-up-and-delivery service was later inaugurated by respondents, effecting substanitally a reduction of 5 cents in the rates, his company immediately increased its rail traffic; that by April, 1932, the volume amounted to 70,000 pounds per month; and that if the sur-

charges were applied on the intrastate traffic under consideration his company would again divert its freight to trucks. Detailed evidence was introduced by numerous shippers showing the volume of freight they forwarded by truck, and many of them stated their preference for the rail carriers, provided the rates are equally as advantageous as those maintained by truck line. A wholesale grocer testified that 80 per cent of his shipments are trucked to destination. A hardware shipper testified that 50 per cent of his shipments are trucked outbound. He receives 150 to 200 carloads of interstate shipments annually. Other similar testimony was introduced. Another shipper testified that since the effective date of the interstate increases his company has diverted to trucks between 50 and 60 carloads per year from Kansas City, Mo., to Oklahoma destinations. His opinion was that if the emergency charges on these interstate shipments were removed his company would not again return to rail transportation.

[fol. 282] Similar contentions with respect to the profitable effect of truck competition on less-than-carload freight were presented to us and considered in connection with interstate traffic. Truck competition constituted one of the more important reasons for denying the 15 per cent increase sought by respondents in Ex parte No. 103, but we were not convinced that it was a reason for denying the small surcharges which we substituted. We reach the same conclusion here.

We find that in view of the surcharges which have become effective interstate in the freight rates on the classes and commodities here in question, under our findings in Fifteen Per Cent Case, 1931, supra, respondents' intrastate rates in Oklahoma on the same classes and commodities, to which no corresponding surcharges have been added, have resulted and will result in unjust discrimination against interstate commerce, except in the case of the intrastate rates on oils, refined, and on other gasolines and fuel, road, and petroleum residual oils when such commodities are moving for further manufacture. We further find that this unjust discrimination shall be removed by applying to the present intrastate rates in Oklahoma on the said commodities, except petroleum oils as above described, the same surcharges as are and for the future may be contemporaneously maintained by respondents; in

accordance with the findings in Fifteen Per Cent Case, 1931, supra, on corresponding interstate traffic.

These findings are without prejudice to the right of the authorities of the State of Oklahoma or of any other interested party to apply in the proper manner for a modification of our findings, and order if one is issued, as to any specified intrastate rate on the ground that the latter is not related to interstate rates in such a way as to contravene the provisions of the interstate commerce act.

Refined petroleum products are subject to no surcharges on interstate traffic in the Southwest, because the rates thereon are the same as or lower than those prescribed or approved in No. 17000, Part 4-A. We here except also fuel, road, and petroleum residual oils, and naphtha and similar commodities when moving for further manufacture, because we are convinced by the evidence that the imposing of surcharges thereon intrastate in Oklahoma would not result in additional revenue for respondents but might, and probably would, so reduce the amount of traffic handled as to result in less aggregate revenue.

Part 10—Texas

The Railroad Commission of Texas authorized generally on Texas intrastate carload freight traffic the same surcharges as were approved by us on corresponding inter- [fol. 283] state traffic. It declined to authorize the surcharge on less-than-carload traffic, or on the distance rates on casing-head (natural) gasoline, in tank carloads, but has indicated its willingness to comply with any adverse conclusions which we may reach herein without the issue of an order on our part.

With respect to the less-than-carload rates, respondents show that the principal railroads operating in Texas carried 182,052 tons of such intrastate traffic in 1931, and that, if this volume were maintained, the loss from inability to apply the surcharge would be $72,820.80 per year.

With respect to natural gasoline, it was testified for respondents that prior to 1931 the Texas intrastate rates were based on the refined-oil scale for distances up to 40 miles single-line and 20 miles joint-line, at which distances a rate of 25 cents was reached. This 25-cent rate was blanketed over all hauls within the State for distances in

excess of those mentioned. In the summer of 1931 the Texas commission supplanted this adjustment with a distance basis starting with 8 cents for 10 miles and reaching 27.5 cents at 601 miles, the latter rate being blanketed for hauls of greater length. Under this scale a rate of 25 cents was reached at 401 miles. On 4,682 cars of natural gasoline, aggregating 129,400 tons, which moved intrastate in 1930, but was admittedly not the total movement for that year, the revenue collected was $612,909.47, whereas the scale prescribed by the Texas commission in 1931 would have produced a revenue of $492,576.33, or $120,333.14 less. It is also shown that on 6,392 cars aggregating 354,825,237 pounds, the total intrastate movement in 1931, the surcharge would have produced $35,482.52 additional revenue. It was testified that the refined-oil scale prescribed in Refined Petroleum Products in the Southwest, 171 I. C. C. 381 (and subsequent reports), averages somewhat in excess of 22 per cent of the first-class scale, whereas the Texas intrastate scale on natural gasoline averages somewhat in excess of 14 per cent of first class.

The rates on natural gasoline were not involved in the case cited, but they were involved in Petroleum and its Products, 171 I. C. C. 286, which covered rates on petroleum products in and between southern and official territories and from various States, including Texas, to those territories. Considerable evidence with respect to natural gasoline was presented in that proceeding and discussed in the report, from which the following is quoted:

> We have considered the nature of this commodity in numerous cases and have consistently refused to accept the view that it is not gasoline. No good and sufficient reason has been here advanced why we should prescribe lower rates on natural gasoline than on ordinary gasoline or other petroleum products.

[fol. 284] . Respondents contend that in view of the relation of the rates on natural gasoline to those on refined petroleum products, and particularly in view of the recent reduction required by the Texas commission in the natural-gasoline rates, there is no justification for failure to permit the surcharge on that commodity. Rates prescribed in Petroleum and its Products, supra, apply on natural gaso-

line from the Southwest to Mississippi River crossings, and it was testified that rates prescribed in Refined Petroleum Products in the Southwest, supra, have been published and apply, under an alternative provision, on natural gasoline from Oklahoma to Texas. The rates prescribed in those cases were excepted from the surcharges.

The Texas commission contends that the influences which prompted its general approval of the surcharges on Texas intrastate carload traffic do not exist to the same extent with respect to less-than-carload traffic. It argues that respondents in seeking the surcharge on Texas merchandise traffic have not given due consideration to the fact that the motor truck has made important inroads into that field.

In denying the increase on this character of traffic the Texas commission was persuaded that no revenue benefit would accrue to the railroads unless a corresponding increase was made in the rates maintained by competing motor transportation agencies. Such an increase was found not justified, and many of these carriers indicated that they were opposed to any increase in their rates. Under these circumstances the Texas commission was convinced that an increase in the less-than-carload rates would result in a decrease rather than an increase in the revenues of the railroads. In this connection reference is made to the fact that the gross revenue of the railroads on intrastate less-than-carload traffic dropped from $22,891,539 in 1929 to $13,111,917 in 1931, whereas the truck revenue showed an increase.

In further support of its action the Texas commission points out that recently some of the Texas railroads, in order to meet the increasingly severe truck competition, have organized so-called rail-transport companies. The service rendered by these companies consists of transportation from store door at origin to store door at destination. The shipments are trucked to and from the railroad stations and the station-to-station service is performed by the railroad under a contract with the transport company. These companies issue their own bills of lading and file their own tariffs. The rates charged are equal to the less-than-carload all-rail rates prescribed by the Texas commission for intrastate movements, which rates, generally

speaking, are also made applicable to similar traffic handled by the common-carrier motor trucks in that State.

[fol. 285] Evidence in support of the position taken by the Texas commission with respect to less-than-carload rates was presented by representatives of traffic organizations of Fort Worth, Houston, and San Antonio, Tex., and by several individual shippers doing a considerable less-than-carload business.

Considerable evidence was presented on behalf of manufacturers of natural gasoline in opposition to the application of the surcharge thereon. They show that it is a raw material only suitable for blending with other gasolines and that there has been a marked decrease in production recently. It is contended that natural gasoline will not continue to move by railroad at higher rates, but that the movement will either be diverted to trucks or pipe lines, or that refineries will supply their needs by the installation of cracking or vapor-recovery processes, which will eliminate the movement thereto of natural gasoline. The evidence is generally similar to that referred to in Petroleum and its Products, supra.

We find that in view of the surcharges which have become effective interstate in the freight rates on the classes and commodities here in question, under our findings in Fifteen Per Cent Case, 1931, supra, respondents' intrastate rates in Texas on the same classes and commodities, to which no corresponding surcharges have been added, have resulted and will result in unjust discrimination against interstate commerce, except in the case of the intrastate rates on casinghead (natural) gasoline, in tank carloads. We further find that this unjust discrimination shall be removed by applying to the present intrastate rates in Texas on the said classes and commodities, except casinghead (natural) gasoline, in tank carloads, the same surcharges as are and for the future may be contemporaneously maintained by respondents, in accordance with the findings in Fifteen Per Cent Case, 1931, supra, on corresponding interstate traffic.

These findings are without prejudice to the right of the authorities of the State of Texas or of any other interested party to apply in the proper manner for a modification of our findings, and order if one is issued, as to any specified intrastate rate on the ground that the latter is not related

to interstate rates in such a way as to contravene the provisions of the interstate commerce act.

Our reasons for excepting casing-head gasoline are the same as those above expressed with respect to petroleum and its products for further manufacture in Oklahoma.

Part 12—Utah

The Public Utilities Commission of Utah refused to approve the surcharges on any intrastate traffic.

[fol. 286] Nine carriers operating in Utah, including the principal railroads serving that State, on the basis of the tonnage handled in 1931 estimate that they would collect $192,129 additional annual revenue if the surcharges were added to the Utah intrastate rates.

The intrastate class rates applying between numerous points in that State are compared by respondents with rates for comparable distances based on the scale of class rates in Arizona Corporation Commission v. A. E. R. R. Co., 113 I. C. C. 52, hereinafter called the 14999 scale, plus the surcharge, for application between points in Arizona on the one hand and points in California and New Mexico and El Paso, Tex., on the other hand. Practically the same scale was prescribed in Portland Chamber of Commerce v. O. R. R. & N. Co., 21 I. C. C. 640, for application from Portland, Oreg., and Seattle and Tacoma, Wash., to interstate destinations in Washington, Oregon, Idaho, and Montana, and in Klamath County Chamber of Commerce v. S. P. Co., 74 I. C. C. 207, for interstate application from Portland and other Oregon points to destinations in southern Oregon and northern California and from central California jobbing points to the same destinations. In Utah Shippers Traffic Asso. v. Oregon S. L. R. Co., 147 I. C. C. 581, rates on the basis of the 1499, scale were prescribed for application from Salt Lake City, Utah, to destinations in Idaho, Montana, Oregon, and Washington. Generally speaking, the Utah class rates are lower than they would be if made on the basis of the 14999 scale.

The intrastate rates applying between points in Utah on brick, cement, sugar, salt, lime, petroleum products, beet pulp, and numerous other commodities of which there was a substantial movement both interstate and intrastate in Utah during 1931, are compared with corresponding interstate rates for similar hauls between points in Utah, Idaho,

Wyoming, Montana, California, and Oregon. The Utah intrastate rates so compared are uniformly lower than the interstate rates.

The rates on coal from producing fields at Castle Gate, Sunnyside, and Thompson, Utah, to representative destinations in Utah are exhibited by the Denver & Rio Grande Western Railroad Company. The average distances from the Castle Gate district mines to Provo, Salt Lake City, and Ogden, Utah, are 80.9, 125, and 162.2 miles, respectively. A comparison of the rates from Castle Gate to numerous destinations in Utah with rates from other western coal-shipping points in Colorado, Wyoming, and New Mexico to various interstate destinations shows that for distances up to 100 miles the Utah intrastate rates are in some instances slightly higher than the corresponding interstate rates, but for distances in excess of 100 miles the Utah State rates are uniformly lower. As an illustration, [fol. 287] the rate on lump coal from Castle Gate to Ogden, 152 miles, is $2.10 a ton, whereas from Walsenburg, Colo., to Castle Rock, Colo., 148 miles, the rate is $2.31, including the surcharge. This respondent states that there are no operating conditions from and to the Utah points which justify a lower level of rates on coal than from Walsenburg. It points out that under the present adjustment the Franklin Sugar Company, a large consumer of coal, operating a plant at Preston, Idaho, just north of the Utah-Idaho State line, is prejudiced because of the fact that it must pay the surcharge on interstate movements of coal, whereas certain Utah sugar factories with plants at Lewiston, Utah, just south of the State line, do not pay it.

The Utah Coal Producers Association, appearing in opposition to the surcharge, offered numerous exhibits showing rates on coal between various points within the State and their relation to rates based on the scale of rates prescribed in Holmes & Hallowell Co. v. G. N. Ry. Co., 69 I. C. C. 11, hereinafter referred to as the Holmes & Hallowell scale, for application on bituminous coal, in carloads, from Duluth, Minn., Superior, Wis., and certain points in North Dakota and South Dakota. The rates from the Castle Gate district to 21 points in Utah for an average distance of 174 miles approximate 151 per cent of the Holmes & Hallowell scale. From this same origin group to destinations in Idaho, Montana, Oregon, Washington, and

Nevada the rates on lump coal range from 92 to 123 per cent of that same scale. In Western Coal Rates, 80 I. C. C. 383, the rates prescribed on lump coal from the Rock Springs-Kemmerer district in Wyoming to 10 destinations in Idaho average approximately 120 per cent of the Holmes & Hallowell scale.

A number of retailers in coal with places of business at Provo, Salt Lake City, and Lehi, Utah, who have in the past shipped by rail, testified that the volume of their business is constantly on the decline. While a portion of this decrease is caused by the general depression, a large percentage of the loss is attributed to the fact that many trucking companies are buying coal at the mines and selling direct to the consumer. It is estimated that from 25 to 30 per cent of the coal moving into Utah County is sold in that manner. They maintain that if the surcharge is authorized on shipments of coal between points within the State a still greater portion of the coal movement will be diverted to the trucking companies.

Evidence was submitted with respect to traffic in ores and concentrates and the rates thereon similar to that which was presented by Idaho and Montana protestants.

The Utah Traffic Shippers Association, an association of jobbers, wholesalers, retailers, fruit, vegetable, and grain growers, flour millers, brokers, and others, oppose any increase in the Utah intrastate rates. They maintain that [fol. 288] the present rates on commodities moving intrastate do not constitute any undue preference or prejudice as between persons or localities in interstate commerce, nor do they constitute any violation of section 13 of the act. They say that any increase in the freight rates, and especially those on short-haul traffic, will divert a considerable volume of tonnage to the trucks and thereby cause a reduction instead of an increase in the carriers' revenue.

A witness for the poultry producers testified that that industry can not bear any additional burdens. They are large users of grain and concentrates, such as fish meal, dry milk, and mineral feeds, such as bone meal and crushed limestone. At present practically all of this traffic is being handled by the railroads.

A number of exhibits were offered by the Utah Traffic Shippers Association to support their position that the railroads operating within the State of Utah are exacting

higher rates for the transportation of commodities in Utah intrastate traffic than are being exacted for the movement of similar commodities moving the same or lesser distances either in interstate commerce or on traffic from and to points in adjoining States. Reference is made to such commodities as brick, cereal beverages, corrugated cartons, packing-house products, canned goods, sugar, and scrap iron. While the rates on the compared commodities from and to points within the State of Utah are for comparable distances as high as or higher than the rates on the same commodities from and to points in adjoining States, there is nothing in the record to show the circumstances and conditions under which the rates on the compared commodities were established. It is the view of this association that any increases in the freight rates on the commodities shipped by its members will operate to reduce rather than increase the carriers' revenue.

The Bingham & Garfield Railway Company, a Class II carrier operating about 20 miles of line near Salt Lake City wholly within the State of Utah, presented no evidence, but in a petition filed at the hearing seeks permission to increase its joint and through intrastate rates by the surcharges, in the event the other carriers operating in Utah are required to increase their joint and through rates participated in by the petitioning carrier. It does not desire any increase in its local rates.

We find that in view of the surcharges which have become effective interstate in the freight rates on the classes and commodities here in question, under our findings in Fifteen Per Cent Case, 1931, supra, respondents' intrastate rates in Utah on the same classes and commodities, to which no corresponding surcharges have been added, have resulted and will result in unjust discrimination [fol. 289] against interstate commerce, except in the case of the intrastate rates on ores and concentrates. We further find that this unjust discrimination shall be removed by applying to the present intrastate rates in Utah on the said classes and commodities, except ores and concentrates, the same surcharges as are and for the future may be contemporaneously maintained by respondents, in accordance with the findings in Fifteen Per Cent Case, 1931, supra, on corresponding interstate traffic.

These findings are without prejudice to the right of the authorities of the State of Utah or of any other interested

party to apply in the proper manner for a modification of our findings, and order if one is issued, as to any specified intrastate rate on the ground that it is not related to interstate rates in such a way as to contravene the provisions of the interstate commerce act.

The reasons for excepting ores and concentrates are those which were given in the discussion of the Idaho rates.

General

An order will be entered discontinuing Part 1—Arizona. Orders will also be entered in accordance with the foregoing findings, except where State commissions directly involved notify us on or before November 1, 1932, that they will promptly permit the increases herein required. If an order is necessary in any part, it will be issued on or immediately after the above date and require the establishment of the increased rates on short notice.

LEWIS, Commissioner, concurring:

In dealing with these cases we must recognize the fact that we face a railroad crisis so acute that the Government is called upon to loan money, not only to get the carriers through it, but to remove so far as possible a menace to financial, insurance, and fiduciary institutions which are heavy holders of the underlying securities of the carriers. The national well-being—directly, bank depositors, insurance-policy holders, public institutions, and credit—has become deeply involved. While most States have cooperated with this commission in its effort to meet this situation by imposing, intrastate, the limited increases on certain traffic which we authorized in Ex parte No. 103, there are States which have not granted such emergency relief and others that have excepted commodities.

As to the first of the above groups, the reasoning and decree of the Supreme Court in Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563, seems to be as applicable to-day as it was to a less acute situation in 1920. Beyond, however, the discrimination against interstate commerce—"a revenue case"—on which the issue is joined in [fol. 290] these proceedings, there are other considerations that, to my mind, deserve attention.

One State can not, under present conditions, long remain on a surcharge plateau of rates while an adjoining and com-

petitive State remains on a nonsurcharge level. States that have assumed the burden suffer impositions and injury if an adjoining State or States do not likewise assume it. Their relationships and groupings often established after long, costly litigation are broken; there is a dislocation of competition between localities, persons, and commodities; violations of the law are created. If these States are not protected the whole system of relief must eventually break down. Under the "marshaling plan" shippers who pay the surcharges are being taxed to maintain a common fund which is available to support all rail service, including that of shippers who are thus exempted from the burden. This is inequitable. It is not sufficient that a State set up the contention that its intrastate rates already are, in relation to the rates in other States or interstate, too high or disproportionate even without the surcharge. In the Wisconsin Case the Supreme Court recognized the practicalities of a necessarily hurried adjustment of rates. Congress, in the law, provided means for relief of States from unlawful inequalities in rate structures. In at least one instance relief is being sought in a pending proceeding.

As to the second group, I concur in the findings in those instances where, in addition to material loss of revenue established of record, the exemption from the surcharge creates interstate-intrastate disruptions, discriminations, and violations of the nature previously outlined. But to go further is an undue and unwarranted invasion of State jurisdiction. The record conveys to my mind the strong impression that in a number of instances States commissions exercised a careful judgment, on the records before them, not unlike that which we exercised in considering probable diversion of traffic, substitutions, and the inability of certain industries and commodities to stand increases, or increases beyond a certain amount. The Supreme Court said in the Wisconsin Case that the power to exercise unified control of intrastate and interstate commerce provided by the act of 1920 was only "to the extent of maintaining efficient regulation of interstate commerce"; that the "Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce and must leave appropriate discretion to the State authorities to deal with intrastate rates as be-

tween themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." Evidently "the level" is not in all instances to be attained by identical increases.

[fol. 291] In admonishing the carriers to make a study of their rate structures to ascertain if revenue could be further improved, we indicated in Ex parte 103 that in some instances reductions might contribute to that end. The Supreme Court in Florida v. United States, 282 U. S. 194, has held that an increase in rates does not ipso facto mean an increase or conservation of revenue. The carriers themselves have been actively engaged in cutting and even slashing rates to hold traffic. They have recognized that there are denials of surcharges by State commissions that have not been without justification. For example, western carriers have not prosecuted their thirteenth-section case against Arizona; southern carriers have brought thirteenth-section proceedings to enforce the Ex parte No. 103 surcharges only against Kentucky, which declined any emergency relief; eastern carriers have not instituted proceedings in behalf of Ex parte No. 103 surcharges, although, as in the South, some States did not authorize surcharges on all the commodities which are authorized on interstate traffic. While we have sustained various commissions in their exception of furniture, oil, nonferrous metals, and some other commodities, such exceptions have been based on some ruling or decision of ours since our findings in Ex parte No. 103, or by some act of the carrier. This is hedging in the field of review and justification too closely.

I believe that there are additional instances in which we should not have attempted to set aside exceptions as to particular traffic made by State authorities.

Aitchison, Commissioner, dissenting:

I am unable to concur in the findings and order herein so far as they are adversary to the action taken by several States. (1) The proceeding which eventuated in our conclusions in Fifteen Per Cent Case, 1931, supra, was in essence an application by the rail carriers, summary and general in form, under section 6 (3) of the act for authority to file schedules of rates more simple than allowable under the rules governing such publications, and upon a shorter period of notice than that generally required by the law.

The proceedings also took on the aspects of a preliminary administrative inquiry as to whether such schedules should be suspended, if filed. In these respects the proceeding followed familiar lines of practice in general rate increase applications. The reasonableness of the interstate rates involved could not be determined in such a character of proceding; the commission went to some pains to make clear that it in nowise was determining the question of reasonableness under section 1 of the act. No such finding is now made in this proceeding; in the light of the theory of the carriers (who are virtually, if not in form, complainants [fol. 292] against the States) as voiced upon argument, no such finding can here be made within the scope of the issue presented. But a determination of the reasonableness of the interstate rates is a necessary prerequisite to the finding of prejudice in respect of State rates against interstate rates, and lacking such finding in this or any prior proceeding, jurisdiction is lacking to make a finding striking down the law of the State.

(2) Beyond this jurisdictional obstacle, the record is not persuasive that the increases in the State rates now required will result in any added revenues. The report discloses the highly speculative character of the testimony adduced by the carriers. Mathematical calculations as to what revenues would be if the traffic of recent years continued to move in past volume have little if any probative force, in the light of the conditions of the day. Calif. Growers' & Shippers' Protective League v. S. P. Co., 185 I. C. C. 299. Particularly is this true when the interstate rates before us are by their terms limited to March 31, 1933, and have but a few months to run.

(3) By and large, the action of the State commissions in exempting the traffic under consideration from the application of the surcharges appears to be in harmony with our own action in surveying the field to determine what interstate traffic would be able to bear temporary increases, and our refusal to permit general increases in respect of innumerable commodities as to which it appeared that increases would diminish revenue by diverting traffic or blocking its movement by rail. Similar latitude in discretion should be accorded to the authorities of the States. With the exercise of their discretion we

may not interfere, unless the case of unlawful transgression of the interstate field is clear. The action of the State commissions here vacated is at least as likely to conserve the revenues of the rail carriers as that prescribed by the majority, and in such circumstances the presumption of validity of the State action with which we start can not be said to be overcome.

The proceeding should be discontinued in all its parts.

BRAINERD, Commissioner, dissenting:

I am of the opinion that the record is insufficient to justify the conclusions of the majority, to warrant the exercise of the power asserted, or to sustain the proposed orders prescribing the level of instrastate rates.

TATE, Commissioner, dissenting in part:

I concur in so much of the report of the majority herein as declines, in the instances so covered, to attempt to compel the State commissions to add the so-called surcharges to the rates charged for freight traffic. I dissent [fol. 293] from every portion of the report which seeks to compel the addition of such surcharges. In cases of this kind the commission may, when it is proper, apparently act from one or both of the following reasons, to-wit: That there is an unjust discrimination or undue prejudice created against interstate commerce; or that, it being a revenue case, the intrastate rates are not contributing their proper proportion to the revenue of carriers, so casting a burden on interstate commerce.

The report of the majority in this case has little to say about the first character of cases, but it is practically stated in the report that, if this were only that kind of case, this commission would first have to find (and I assume this means upon a sufficient record) that the interstate rate was a reasonable rate. I do not believe this commission has ever had a record upon which the rates resulting from the addition of surcharges could be held to be reasonable rates. In so far as the case may be said to be a revenue case, I do not believe the carriers have made a record which carries the burden of showing that the revenues would really be increased by the addition of these surcharges. For me, it is not sufficient merely to show that,

if the same amount of traffic was caried by rail carriers with the surcharge added as was carried without the surcharge, greater revenue would result. This, of course, would be obvious, if that were all. The record is at least in equipoise as to whether there have been and would be, for the future, greater revenues resulting from the additional surcharges than would result if the surcharges were not imposed. The report of the majority cites various general-revenue cases where there have been general advances or reductions. I do not regard them as in point here. The commission unanimously denied the 15 per cent increase which was sought. Had the commission added one-half of 1 per cent, or 1 per cent, or 1.5 per cent, or any other conceivable general percentage, then I think those cases would have been in point, in that the various States were permitted to assume the burden of showing where any particular form of traffic or commodities should not be made the subject of the general advance. But this the commission did not do in this case. It undertook, upon what I have considered an insufficient record, to pick out in advance certain commodities upon which alone it would allow rates to go in without suspension; and even as to those so picked out it did not allow a uniform surcharge, but allowed some three or four different amounts of surcharge.

I do not believe, in a case of this kind, that the burden can be said to be shifted to the States to take an article out of the rule, when the commission itself has seen fit not to apply a general rule, but to choose, itself, certain articles [fol. 294] as to which a surcharge is to apply, and then to fix a different surcharge for different articles in the chosen list. I see nothing to take, in this kind of a proceeding, the burden off the carriers to justify the increase in rates, which is the general rule.

Commissioners Farrell and Mahaffie concur in the result.

[fols. 295 & 296] Order

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION, HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE 29TH DAY OF SEPTEMBER, A. D. 1932

No. 25135

Increases in Intrastate Freight Rates—Part 1, Arizona

The commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon in the above-entitled proceeding, which said report is hereby referred to and made a part hereof:

It is ordered, That said proceeding, in so far as it relates to rates in Arizona, be, and it is hereby, discontinued.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fols. 297 & 298] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Equity. No. 1039

[Title omitted]

MOTION OF EASTERN OHIO COAL OPERATORS' ASSOCIATION ET AL. FOR LEAVE TO INTERVENE—Filed June 3, 1933

Now comes Eastern Ohio Coal Operators' Association, Akron Coal Company, Big Five Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal and Dock Company, Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company, Wheeling Township Coal Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company, B. F. Goodrich Company, Republic Steel Corporation, Otis Steel Company and C. H. Henkel, Receiver, Empire Steel Corporation, by E. S. Ballard, their solicitor, and move the court for leave to

intervene herein on the part of the plaintiffs and tender herein their petition to which reference is made for the grounds of this motion.

E. S. Ballard, Solicitor for Above Named Petitioners, 120 South LaSalle Street, Chicago, Ill.

[fol. 299] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Equity. No. 1039

[Title omitted]

PETITION OF INTERVENTION OF EASTERN OHIO COAL OPERATORS' ASSOCIATION, AKRON COAL COMPANY, BIG FIVE COAL COMPANY, CAMBRIDGE COLLIERIES COMPANY, CLARKSON COAL MINING COMPANY, HANNA COAL COMPANY, LORAIN COAL AND DOCK COMPANY, OHIO AND PENNSYLVANIA COAL COMPANY, UNITED STATES COAL COMPANY, WARNER COLLIERIES COMPANY, WHEELING TOWNSHIP COAL MINING COMPANY, YOUGHIOGHENY & OHIO COAL COMPANY, CLEVELAND CHAMBER OF COMMERCE, AKRON CHAMBER OF COMMERCE, GOODYEAR TIRE AND RUBBER COMPANY, FIRESTONE TIRE AND RUBBER COMPANY, B. F. GOODRICH COMPANY, REPUBLIC STEEL CORPORATION, OTIS STEEL COMPANY AND C. H. HENKEL, RECEIVER, EMPIRE STEEL CORPORATION—Filed Jan. 6, 1934

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

Now come your petitioners, Eastern Ohio Coal Operators' Association, Akron Coal Company, Big Five Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal and Dock Company, Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company, Wheeling Township Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company, B. F.

Goodrich Company, Republic Steel Corporation, Otis Steel Company and C. H. Henkel, Receiver, Empire Steel Corporation, and respectfully represent to this Honorable Court that they have an interest in the matters involved in this suit, and desire to intervene and be made parties plaintiff to said suit, and say:

1. That under the provisions of the Act of Congress of October 22, 1913, c. 32, 38 Stat. 220; Feb. 13, 1925, c. 229, [fol. 300] sec. 1, 43 Stat. 938, relating to suits to suspend or set aside any order of the Interstate Commerce Commission, it is provided that:

"The procedure in district courts * * * in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title * * *."

Section 45a above referred to relating to procedure in cases involving the validity of orders of the Interstate Commerce Commission, contains the following proviso:

"Provided, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their own counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits."

2. That your petitioners, except Eastern Ohio Coal Operators' Association, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company and B. F. Goodrich Company, are, and at all times hereinafter mentioned have been, corporations organized and existing under the laws of the State of Ohio and other States of the United States, owning and/or operating coal mines in the Ohio No. 8 and Cambridge districts in eastern Ohio;

that your petitioner Eastern Ohio Coal Operators' Association is a voluntary association of operators producing bituminous coal in the Pittsburgh vein of Ohio, with its principal office in Cleveland, Ohio, and that one of the objects of this association is to protect and promote in all lawful ways the transportation rights and interests of its members; that your petitioner, The Cleveland Chamber of Commerce, is a non-profit corporation, one of the objects of which is to promote and protect in all lawful ways the transportation rights and interests of its members, some of whom are large consumers of coal shipped from the Ohio [fol. 301] Number 8 and Cambridge Districts to Cleveland, Ohio; that your petitioner Akron Chamber of Commerce is a voluntary association of the manufacturing and mercantile establishments of Akron, Ohio, one of the objects of which is to protect and promote in all lawful ways the transportation rights and interests of its members some of whom are large consumers of coal shipped from the Ohio No. 8 and Cambridge districts to Akron, Ohio; that your petifioners Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company and B. F. Goodrich Company are corporations organized and existing under and by virtue of the laws of the State of Ohio and are engaged in the manufacture of rubber tires and other rubber articles and consume large quantities of bituminous coal shipped from the Ohio No. 8 and Cambridge districts to Akron, Ohio; that petitioners Republic Steel Corporation, Otis Steel Company and C. H. Henkel, Receiver, Empire Steel Corporation, are corporations organized and existing under and by virtue of the laws of the State of Ohio and are engaged in the manufacture of iron and steel articles at various points in northeastern Ohio, including Canton, Massillon and Cleveland and consume large quantities of bituminous coal shipped from Ohio No. 8 district to Canton, Massillon and Cleveland, Ohio.

3. That your petitioners were parties in interest to the proceeding before the Interstate Commerce Commission entitled Intrastate Rates on Bituminous Coal within the State of Ohio, No. 25566, in which the report and order bearing date May 2, 1933, herein complained of, were made, and to the proceeding before the Interstate Commerce Commission entitled Surcharge on Bituminous Coal Within the

State of Ohio, No. 25885, in which the report and order bearing date May 9, 1933, herein complained of, were made.

4. That in said proceeding before said Interstate Commerce Commission your petitioners introduced evidence and, by their attorneys, produced, examined and cross-examined witnesses, and were heard in argument and upon brief in all the matters involved in said proceeding; that your petitioners have an interest in the matters in litiga- [fol. 302] tion in the above entitled cause; that unless the orders of the Commission above referred to are vacated and set aside your petitioners will suffer great and irreparable damage and injury the amount of which cannot be definitely ascertained; and that your petitioners seek and demand the same relief as that which is sought by plaintiffs in this case.

In support of this petition of intervention, your petitioners herein incorporate and make a part of this petition the following paragraphs contained in the bill of complaint filed by the plaintiffs herein, to wit: Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 and ask that the said paragraphs and each and every one of them be deemed a part of this petition, the same as if they were set out in full.

Wherefore, your petitioners pray for an order granting leave to intervene and making them parties plaintiff herein in all respects with the same rights and privileges as if your petitioners had filed the original bill of complaint; and that your petitioners may have such other and further relief in the premises as equity may require and as to your Honors may seem meet.

Eastern Ohio Coal Operators' Association, Akron Coal Company, Big Five Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal and Dock Company, Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company, Wheeling Township Coal Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company, B. F. Goodrich Company, Republic Steel Corporation, Otis

Steel Company, C. H. Henkel, Receiver, Empire Steel Corporation, by E. S. Ballard, Solicitor for Above Named Petitioners, 120 South LaSalle St., Chicago, Illinois.

[fols. 303 & 304] *Duly sworn to by D. F. Hurd. Jurat omitted in printing.*

[fols. 305 & 306] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Equity No. 1039

[Title omitted]

ORDER ALLOWING INTERVENTION—Filed Jan. 6, 1934

This cause coming on to be heard upon the motion of Eastern Ohio Coal Operators' Association, Akron Coal Company, Big Five Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal and Dock Company, Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company, Wheeling Township Coal Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company, B. F. Goodrich Company, Republic Steel Corporation, Otis Steel Company and C. H. Henkel, Receiver, Empire Steel Corporation for leave to intervene herein as parties plaintiff, and the court being fully advised in the premises,

It is hereby ordered, adjudged and decreed that the above named petitioners have leave, and leave is hereby granted to them, to intervene in this suit for their own interests and the interests of those whom they represent, as parties plaintiff herein, with the same rights and privileges as if they had filed the original bill of complaint.

Enter:

Hough, Judge. Nevin, J.

[fols. 307 & 308] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Equity No. 1039

[Title omitted]

MOTION OF THE BOARD OF COUNTY COMMISSIONERS OF BELMONT COUNTY, OHIO, ET AL., FOR LEAVE TO INTERVENE—Filed June 3, 1933

Now come the Board of County Commissioners of Belmont County, Ohio, Burn Ohio Coal Association, The Second National Bank of St. Clairsville, Ohio, St. Clairsville Rotary Club, The Steubenville Clearing House Association, The Cambria Collieries Company, Fisher Body Company, Jaite Company, The Colonial Insulator Company, The United State Stoneware Company, The Klages Coal & Ice Company, The Mansfield Chamber of Commerce, Goegele Bros., The Hanley Milling Company, The Garnes Manufacturing Company, The Hinde & Daugh Paper Company, The Cleveland & Sandusky Brewing Company, The Wagner Quarries Company, George A. Matthes Coal & Supply Company, The Waldock Packing Company, The Sandusky Chamber of Commerce, The Sandusky Packing Company, The Western Reserve Rubber Company, Medusa Portland Cement Company, M. L. Branyan & Bro. and Kallmerten & Baer, Inc., by E. S. Ballard, their solicitor, and move the court for leave to intervene herein on the part of the plaintiffs and tender herein their petition to which reference is made for the grounds of this motion.

E. S. Ballard, Solicitor for the Above Named Petitioners, 120 South LaSalle Street, Chicago, Illinois.

[File endorsement omitted]

[fol. 309] IN UNITED STATES DISTRICT COURT

Equity. No. 1039

[Title omitted]

PETITION OF INTERVENTION OF BOARD OF COUNTY COMMISSIONERS OF BELMONT COUNTY, OHIO; BURN OHIO COAL ASSOCIA-

TION, THE SECOND NATIONAL BANK OF ST. CLAIRSVILLE, OHIO; ST. CLAIRSVILLE ROTARY CLUB, THE STEUBENVILLE CLEARING HOUSE ASSOCIATION, THE CAMBRIA COLLIERIES COMPANY, FISHER BODY COMPANY, JAITE COMPANY, THE COLONIAL INSULATOR COMPANY, THE UNITED STATES STONEWARE COMPANY, THE KLAGES COAL & ICE COMPANY, THE MANSFIELD CHAMBER OF COMMERCE, GOEGELE BROS., THE HANLEY MILLING COMPANY, THE BARNES MANUFACTURING COMPANY, THE HINDE & DAUGH PAPER COMPANY, THE CLEVELAND & SANDUSKY BREWING COMPANY, THE WAGNER QUARRIES COMPANY, GEORGE A. MATTHES COAL & SUPPLY COMPANY, THE WALDOCK PACKING COMPANY, THE SANDUSKY CHAMBER OF COMMERCE, THE SANDUSKY PACKING COMPANY, THE WESTERN RESERVE RUBBER COMPANY, MEDUSA PORTLAND CEMENT COMPANY, M. L. BRANYAN & BRO., AND KALLMERTEN & BAER, INC.—Filed Jan. 6, 1934.

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

Now come your petitioners Board of County Commissioners of Belmont County, Ohio, Burn Ohio Coal Association, The Second National Bank of St. Clairsville, Ohio, St. Clairsville Rotary Club, The Steubenville Clearing House Association, The Cambria Collieries Company, Fisher Body Company, Jaite Company, The Colonial Insulator Company, The United States Stoneware Company, The Klages Coal & Ice Company, The Mansfield Chamber of Commerce, Voegele Bros., The Hanley Milling Company, The Barnes Manufacturing Company, The Hinde & Daugh Paper Company, The Cleveland & Sandusky Brewing Company, The Wagner Quarries Company, George A. Matthes Coal & Supply Company, The Waldock Packing Company, The Sandusky Chamber of Commerce, The Sandusky Packing Company, The Western Reserve Rubber Company, Medusa Portland Cement Company, M. L. Branyan & Bro. and Kallmerten & Baer, Inc., and respectfully represent to this Honorable Court that they have an interest in the matters in- [fol. 310] volved in this suit, and desire to intervene and be made parties plaintiff to said suit, and say:

1. That under the provisions of the Act of Congress of October 22, 1913, c. 32, 38 Stat. 220; Feb. 13, 1925, c. 229, sec.

1, 43 Stat. 938, relating to suits to suspend or set aside any order of the Interstate Commerce Commission it is provided that:

"The procedure in district courts * * * in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title, * * *."

Section 45a above referred to relating to procedure in cases involving the validity of orders of the Interstate Commerce Commission, contains the following proviso:

"Provided further, That communities, associations, corporations, firms and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceedings over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein."

2. That your petitioners are communities, associations, corporations, firms and individuals doing business in the State of Ohio and having offices in said state and that they or those whom they represent are dealers in and/or consumers of and/or producers of bituminous coal mined and transported by railroad in intrastate commerce within the State of Ohio.

3. That your petitioners are interested in the controversy or question before the Interstate Commerce Commission in Intrastate Rates on Bituminous Coal Within the State of Ohio, No. 25566, in which the report and order bearing date [fol. 311] May 2, 1933, herein complained of, were made; that your petitioners are interested in the controversy or question before the Interstate Commerce Commission in Surcharges on Bituminous Coal Within the State of Ohio, No. 25885, in which the report and order bearing date May

9, 1933, herein complained of, were made; and that your petitioners have an interest in the matters involved in this suit.

4. That unless the orders above referred to are vacated and set aside your petitioners will suffer great and irreparable damage and injury, the amount of which cannot be definitely ascertained; and that your petitioners seek and demand the same relief as that which is sought by the plaintiffs in this case.

In support of this petition of intervention, your petitioners herein incorporate and make a part of this petition the following paragraphs contained in the bill of complaint filed by the plaintiffs herein to wit: Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 and ask that the said paragraphs and each and every one of them be deemed a part of this petition the same as if they were set out in full.

Wherefore, your petitioners pray for an order granting leave to intervene and making them parties plaintiff herein in all respects with the same rights and privileges as if your petitioners had filed the original bill of complaint; and that your petitioners may have such other and further relief in the premises as equity may require and as to your Honors may seem meet.

Board of County Commissioners of Belmont County, Burn Ohio Coal Association, The Second National Bank of St. Clairsville, Ohio, St. Clairsville Rotary Club, The Steubenville Clearing House Association, The Cambria Collieries Company, Fisher Body Company, Jaite Company, The Colonial Insulator Company, The United States Stoneware Company, The Klages Coal & Ice Company, The Mansfield Chamber of Commerce, Goegele Bros., The Hanley Milling Company, The Barnes Manufacturing Company, The Hinde & Daugh Paper Company, The Cleveland & Sandusky Brewing Company, The [fols. 312 & 313] Wagner Quarries Company, George A. Matthes Coal & Supply Company, The Waldock Packing Company, The Sandusky Chamber of Commerce, The Sandusky Packing Company, The Western Reserve Rubber Company, Medusa

Portland Cement Company, M. L. Branyan & Bro., Kallmerten & Baer, Inc., E. S. Ballard, Solicitor for the Above Named Petitioners, 120 South La-Salle St., Chicago, Ill.

Duly sworn to by D. F. Hurd. Jurat omitted in printing.

[fols. 314 & 315] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Equity. No. 1039

[Title omitted]

ORDER ALLOWING INTERVENTION—Filed Jan. 6, 1934

"This cause coming on to be heard upon the motion of the Board of County Commissioners of Belmont County, Ohio, Burn Ohio Coal Association, The Second National Bank of St. Clairsville, Ohio, St. Clairsville Rotary Club, The Steubenville Clearing House Association, The Cambria Collieries Company, Fisher Body Company, Jaite Company, The Colonial Insulator Company, The United States Stoneware Company, The Klages Coal & Ice Company, The Mansfield Chamber of Commerce, Geogele Bros., The Hanley Milling Company, The Barnes Manufacturing Company, The Hinde & Daugh Paper Company, The Cleveland & Sandusky Brewing Company, The Wagner Quarries Company, George A. Matthes Coal & Supply Company, The Waldock Packing Company, The Sandusky Chamber of Commerce, The Sandusky Packing Company, The Western Reserve Rubber Company, Medusa Portland Cement Company, M. L. Branyan & Bro., and Kallmerten & Baer, Inc. for leave to intervene herein as parties plaintiff, and the court being fully advised in the premises,

It is hereby ordered, adjudged and decreed, that the above named petitioners have leave, and leave is hereby granted to them, to intervene in this suit for their own interests and the interests of those whom they represent, as parties plaintiff herein, with the same rights and privileges as if they had filed the original bill of complaint.

Enter:

Hough, Judge. Nevin, J.

[fol. 316] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

[Title omitted]

PETITION OF INTERVENTION—Filed June 3, 1933

To the Honorable District Court of the United States for the Southern District of Ohio, Eastern Division:

Come now The Baltimore and Ohio Railroad Company, a corporation under the laws of the State of Maryland, The Chesapeake and Ohio Railway Company, a corporation under the laws of the State of Virginia, Erie Railroad Company, a corporation under the laws of the State of New York, The Monongahela Railway Company, a corporation under the laws of the Commonwealth of Pennsylvania, The New York Central Railroad Company, a corporation under the laws of the State of New York, The New York, Chicago and St. Louis Railroad Company, a corporation under the laws of the State of Ohio, Norfolk & Western Railway Company, a corporation under the laws of the State of Virginia, The Pennsylvania Railroad Company, a corporation under the laws of the Commonwealth of Pennsylvania, Pittsburgh, Chartiers and Youghiogheny Railway Company, a corporation under the laws of the State of the Commonwealth of Pennsylvania, The Pittsburgh & Lake Erie Railroad Company, a corporation under the laws of the Commonwealth of Pennsylvania, Western Maryland Railway Company, a corporation under the laws of the State of Maryland, The Virginian Railway Company, a corporation under the laws of the State of [fol. 317] Virginia, and The Pittsburgh & West Virginia Railway Company, a corporation under the laws of the State of Pennsylvania, and move the court for leave to intervene in the above-styled cause and to become parties thereto in order to protect their rights involved in such proceeding. Each of said interveners is and for many years has been engaged in operating a railroad within the State of Ohio, extending in itself or in connection with other railroads and systems into other States of the United

States, and is and has been a common carrier of freight by railroad within the State of Ohio, engaged in business as such common carrier of transportation of freight intrastate between points in the State of Ohio, and points in other States, and at all times hereinafter mentioned was a common carrier of freight by railroad subject to the provisions of the Act of Congress known as the "Interstate Commerce Act" and "Transportation Act 1920" and each of said interveners is vitally interested in the subject-matter of this complaint and desires to intervene therein on behalf of the defendants and as such to answer the petition herein and to participate in the trial of said cause as a party defendant.

I

Interveners admit the allegations of paragraph 1 of the petition. They respectfully refer the court to the text of the report and orders of the Interstate Commerce Commission (Exhibits A and B to original petition) for full, complete and accurate information concerning the contents thereof.

II

Interveners admit that the orders herein complained of were not made upon the petition of any party hereto, but deny that the matter complained of in the petitions before the Commission in the proceedings in which the said orders were made was limited to the alleged effect upon interstate commerce, and they allege, on the contrary, that said petition complained of the effect upon persons and localities engaged in interstate commerce, as well as upon interstate commerce, of rates prescribed, authorized or per-
[fol. 318] mitted by authority of the State of Ohio for the transportation by railroad in intrastate commerce of bituminous coal shipped from mines in the State of Ohio, including mines in the Southern District, Eastern Division, thereof.

III

Interveners admit the allegations of paragraph 3 of the petition.

IV

Interveners admit the allegations contained in paragraph 4 of the petition, subject, however, to the paramount

authority of the Interstate Commerce Commission on all questions of unlawful discrimination against interstate commerce and against persons and localities engaged in interstate commerce.—

V

Interveners admit the allegations contained in paragraph 5 of the petition, except to the extent that said allegations describe or characterize the rates referred to as having been prescribed by the Ohio Commission in its Docket No. 7252 as "maximum reasonable rates", and interveners deny that said rates so prescribed by the Ohio Commission are "maximum reasonable rates". Further answering the allegations of this paragraph, interveners say that they are required by the order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission and, effective June 10, 1933, to thereafter charge, in lieu of the rates prescribed by the Ohio Commission for the transportation of coal between points within the State of Ohio, referred to in said paragraph, rates prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

VI

Interveners admit the allegations contained in paragraph 6 of the petition, except to the extent that said alle-
[fol. 319] gations describe or characterize the rates referred to as having been prescribed by the Ohio Commission in its Docket No. 7036 as "a maximum reasonable rate", and interveners deny that said rate so prescribed by the Ohio Commission is "a maximum reasonable rate". Further answering the allegations of this paragraph, interveners say that they are required by the order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission and, effective June 10, 1933, to thereafter charge, in lieu of the rate prescribed by the Ohio Commission for the transportation of coal between points within the State of Ohio, referred to in said paragraph, the rate prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

VII

Interveners admit the allegations contained in paragraph 7 of the petition.

VIII

Interveners admit the allegations contained in paragraph 8 of the petition. Further answering the allegations of this paragraph, interveners say that the Wheeling & Lake Erie Railway Company, The Lorain & West Virginia Railway Company, and The Akron, Canton & Youngstown Railway Company are required by the order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission and, effective June 10, 1933, to thereafter charge, in lieu of the rates published by them for the transportation of coal between points within the State of Ohio, referred to in said paragraph, rates prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

IX

Interveners admit the allegations contained in paragraph 9 of the petition. Further answering the allegations of this paragraph, interveners say that the Pittsburgh & West Virginia Railway Company is required by [fol. 320] the order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission and, effective June 10, 1933, to thereafter charge, in lieu of the rates published by it for the transportation of coal between points within the State of Ohio, referred to in said paragraph, rates prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

X

Interveners admit the allegations contained in paragraph 10 of the petition. Further answering the allegations of this paragraph, the interveners referred to therein say that they are required by the order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission and, effective June 10, 1933, to thereafter charge, in lieu of the rates published by them for the transportation of coal between points within the

State of Ohio, referred to in said paragraph, rates prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

XI

Interveners admit the allegations contained in paragraph 11 of the petition. Further answering the allegations of this paragraph, the interveners referred to therein say that they and the Wheeling & Lake Erie Railway Company are required by the order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission and, effective June 10, 1933, to thereafter charge, in lieu of the rate prescribed by the Ohio Commission in its Docket No. 8072 for the transportation of coal between points within the State of Ohio, referred to in said paragraph, rates prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

[fol. 321]

XII

Interveners admit the allegations contained in paragraph 12 of the petition. Further answering the allegations of this paragraph, the intervener referred to therein says that it, together with other carriers joining with it in through joint rates on coal from its mines in the Pomeroy District, is required by the order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission, and effective June 10, 1933, to thereafter charge, in lieu of the rates prescribed by the Ohio Commission in its Docket No. 8097 for the transportation of coal between points within the State of Ohio, referred to in said paragraph, rates prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

XIII

Interveners admit the allegations contained in paragraph 13 of the petition, and, further answering, say that the said order of the Interstate Commerce Commission of May 2, 1933, is the paramount authority on all questions of unlawful discrimination of intrastate rates against interstate

commerce or against persons and localities engaging in interstate commerce and that the interveners are required to comply with the terms of said order, notwithstanding anything in the orders of the Ohio Commission, or in the statutes of the State of Ohio to the contrary.

XIV

Interveners admit the allegations contained in paragraph 14 of the petition.

XV

Interveners admit that the orders of the Interstate Commerce Commission of May 2, 1933, in Docket No. 25566 and of May 9, 1933, in Docket No. 25885 will require certain [fol. 322] shipments of bituminous coal within the State of Ohio to pay freight charges at rates higher than those now in effect by virtue of mandatory or permissive orders of the Ohio Commission, referred to in the petition herein, but they deny each and every other allegation of said paragraph 15.

Further answering the allegations of this paragraph, interveners ask that reference be made to said orders of the Interstate Commerce Commission and the report accompanying said orders. Interveners aver that the said orders of the Interstate Commerce Commission were amply supported in every part thereof by substantial evidence and that the evidence so legally offered and received not only justified but required the findings made in these proceedings by the Interstate Commerce Commission; and said orders did not require increases in lawful rates, but, on the contrary, required increases in intrastate rates found by the Interstate Commerce Commission to be unlawful, in that said rates caused undue preference and undue prejudice as between persons and localities and intrastate commerce, on the one hand, and interstate commerce, on the other, and undue, unreasonable and unjust discrimination against interstate commerce, which is forbidden and declared to be unlawful by Section 13 (4) of the Interstate Commerce Act.

XVI

Answering paragraph 16, interveners say that the State of Ohio, through the Ohio Commission and otherwise, is

entitled to regulate rates for the transportation of bituminous coal by railroads within the State of Ohio, including the rates referred to in the petition and in the orders of the Interstate Commerce Commission hereinbefore referred to, only to the extent that such regulation is not in conflict with and in contravention of paragraph 3 of Section 8 of Article 1 of the Constitution of the United States and the Acts of Congress regulating interstate commerce pursuant to the authority of said constitutional provision.

[fol. 323]

XVII

Interveners deny the allegations contained in paragraph 17 of the petition.

XVIII

Interveners deny each and every allegation of fact and each and every conclusion of law contained in paragraphs 18, 19 and 20 of the petition. Interveners aver that the said orders of the Interstate Commerce Commission hereinbefore referred to were amply supported as to each and every part thereof by substantial evidence; that the findings of fact made by the Commission were also supported by substantial evidence; that such evidence, not only justified but required the findings made in those proceedings by the Interstate Commerce Commission. Interveners further aver that no allegations contained in these paragraphs of the petition have any effect upon the validity of the orders of the Interstate Commerce Commission which are complained of in this cause.

XIX

Interveners are without sufficient information to admit or deny the allegations of paragraph 21 to the effect that the State of Ohio and its people have invested vast amounts of money in developing coal mines and industrial property and institutions in Ohio and in preparing and equipping said properties for the production and consumption of Ohio coal. Petitioners, however, deny each and every other allegation of said paragraph. They specifically aver that the enforcement of the orders of the Interstate Commerce Commission hereinbefore referred to, based upon substantial evidence and made pursuant to authority of the Consti-

tution of the United States and Acts of Congress duly passed pursuant thereto, will not irreparably injure or damage the State of Ohio or its people and will not deprive them of their property without due process of law.

[fol. 324] XX

Interveners deny each and every allegation of fact and each and every conclusion of law contained in paragraph XXII of the petition.

Further answering paragraphs XIII to XXII of the petition, interveners again aver that the paramount regulatory authority of common carriers of freight and passengers for hire is the Interstate Commerce Commission, by virtue of the powers vested in it by the Congress of the United States under and in accordance with Paragraph 3 of Section 8 of Article 1 of the Constitution of the United States, and interveners aver that, as to the subject-matter of this proceeding, the action of the Public Utilities Commission of Ohio, if not nullified and set aside, in accordance with the findings and orders of the Interstate Commerce Commission hereinbefore referred to, would result in unjust discrimination against interstate commerce and persons and localities engaging in interstate commerce and undue preference in favor of intrastate commerce between points in Ohio, in violation of Section 13 (4) of the Interstate Commerce Act.

Interveners aver that said report and orders of the Interstate Commerce Commission were made after full hearings before the Interstate Commerce Commission; that at said hearings and in all proceedings in connection therewith the State of Ohio and the Public Utilities Commission of Ohio and various Ohio shipping interests were represented by their attorneys, who took an active part in the making of the record in said proceedings; that at said hearings the Interstate Commerce Commission accorded to all parties to said proceedings, including the State of Ohio *the* the Public Utilities Commission of Ohio and said shipping interests, full and fair opportunity to be heard upon all the matters involved in said investigations; that at said hearings a large volume of testimony and other [fol. 325] evidence upon the matters involved was submitted to the Interstate Commerce Commission for consideration on behalf of said parties, including the Public

Utilities Commission of Ohio and the State of Ohio, petitioners herein, by their respective attorneys; that at said hearings and subsequently, both orally and in briefs files in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties, by their respective counsel, whereupon the Interstate Commerce Commission determined said matters and entered its said report and orders of May 2, 1933, and May 9, 1933.

Interveners further allege that said findings and conclusions and orders of the Interstate Commerce Commission are fully supported by the evidence submitted in said proceedings as aforesaid, and the interveners deny each of and all the allegations to the contrary contained in the Bill of Complaint.

Except as herein expressly admitted, interveners deny each and all of the allegations contained in the petition herein.

Wherefore, interveners pray that the petition in this cause be dismissed.

Charles R. Webber, Attorney for the Baltimore and Ohio Railroad Company. M. Carter Hall, Attorney for the Chesapeake and Ohio Railway Company. Marion B. Pierce, Attorney for Erie Railroad Company. W. S. Bronson, Attorney for Pittsburg & West Virginia Railway Company. Guernsey Orcutt, Attorney for the Monongahela Railway Company. Leo P. Day, Attorney for the New York Central Railroad Company. W. J. [fols. 326 & 327] Stevenson, Attorney for the New York, Chicago and St. Louis Railroad Company. D. Lynch Younger, Attorney for Norfolk & Western Railway Company. Guernsey Orcutt, Attorney for the Pennsylvania Railroad Company. Guernsey Orcutt, Attorney for Pittsburgh, Chartiers and Youghiogheny Railway Company. Leo P. Day, Attorney for the Pittsburgh & Lake Erie Railroad Company. Charles R. Webber, Attorney for Western Maryland Railway Company. John C. Donnally, Attorney for the Virginian Railway Company.

Duly sworn to by J. B. McCorkle. Jurat omitted in printing.

[fol. 328] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

[Title omitted]

ORDER GRANTING INTERVENING PETITION—Filed Jan. 13, 1934

Upon consideration of the intervening petition filed herein on June 3, 1933, by the Baltimore & Ohio Railroad Company and other carriers, parties to the proceedings before the Commission in Docket No. 25566, Intrastate Rates on Bituminous Coal within State of Ohio, and it appearing that they have an interest herein and are entitled under the provisions of the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, to intervene herein:

It is ordered, nunc pro tunc as of June 3, 1933, that the said petition be, and the same is hereby, granted.

Hough, United States District Judge. Nevin, United States District Judge.

[fol. 328a] IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

[Title omitted]

AFFIDAVIT OF ROY S. KERN

STATE OF OHIO,
County of Franklin, ss:

Roy S. Kern, being first duly sworn on oath, deposes and says that he is Chairman of the Coal, Coke and Iron Ore Committee of Central Freight Association Territory, of which all of the railroads petitioners in the proceeding before the Interstate Commerce Commission known as Docket 25566 and related cases—Intrastate Rates on Bituminous Coal Within the State of Ohio—are members; that he has been Chairman of said Committee for approximately four and one-half (4½) years; that prior thereto he was employed by the New York Central Railroad in its

Coal Traffic Department for a period of more than ten (10) years, and that he is familiar with the bituminous coal rate structure obtaining in Ohio, Pennsylvania and West Virginia, and generally with the movement of coal thereunder.

That as such Chairman of said Coal, Coke and Iron Ore Committee he has kept in the past and now does keep informed with respect to the transportation of bituminous coal in the territory under his jurisdiction which embraces the entire State of Ohio, and that he has examined the re-
[fol. 328b] ports of the Ohio Bureau of Coal Statistics, operated and maintained under the supervision of F. V. Davis, Columbus, Ohio, on behalf of all of the bituminous coal originating carriers in Central Freight Association territory and that in the period from January 1st to March 31, 1933, inclusive, he found that there was shipped from origins and origin districts within the State of Ohio to Akron, Alliance, Canton, Cleveland, Lorain, South Lorain, Mansfield and Massillon, Ohio, and their immediate environs, upon rates affected by the order of the Interstate Commerce Commission dated May 2nd, 1933, in said Docket 25566 and related cases, a total of 1,144,704 net tons, and that the difference in the total freight charges actually collected and those which would have resulted had the rates found proper by the Interstate Commerce Commission in its said decision and order applied was $303,332.03, which extended to an annual basis would mean a yearly revenue loss to the carriers of $1,213,328.12. This figure does not take into account emergency charges of 6 cents per net ton required to be applied by the Interstate Commerce Commission's order in Docket 25885, Surcharge on Bituminous Coal Within the State of Ohio.

This affiant further states that the tonnage and revenue losses set forth above understate considerably the actual revenue losses which would be directly resultant from an order of this Honorable Court enjoining, setting aside or postponing the effective date of the said order of the Interstate Commerce Commission.

This affiant further states that the intrastate rates which the Interstate Commerce Commission by its said order has required to be increased have existed since the effective dates of the various orders of the Public Utilities Commission of Ohio, viz.. August and September, 1932, and as

a result thereof the carriers petitioners in said Docket 25566 have been subjected to severe and continual revenue losses by reason thereof; that said losses will cease on June 10, 1933, under the order of the Interstate Commerce Commission aforesaid unless the enforcement of said order be temporarily restrained by this Honorable Court, in which event the irreparable losses to said petitioners will [fol. 328c] be at the rate of $1,213,328.12 annually and said petitioning carriers will be without means of reparation for the losses to which they would be so subjected, which losses materially diminish and impair their revenues and the maintenance by them of an adequate system of transportation in the so-called Eastern District.

This affiant further states that the tonnage figures used as the basis for the calculation of the revenue losses included only shipments destined to the cities specifically named and their suburban or industrial environs, whereas the rates which the order and decision of the Interstate Commerce Commission affect apply to all points intermediate to the cities named, and that were it possible for affiant to calculate within the time available revenue losses based upon all traffic directly affected the annual figure of $1,213,328.12, above stated, would be appreciably increased.

(Signed) Roy S. Kern.

Subscribed and sworn to before me this Third day of June, 1933. —— ——, Notary Public.

[fol. 329] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

[Title omitted]

PETITION OF WESTERN PENNSYLVANIA COAL TRAFFIC BUREAU AND INDIVIDUAL MEMBERS THEREOF FOR LEAVE TO INTERVENE—Filed June 3, 1933

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

Respectfully come your petitioners, Western Pennsylvania Coal Traffic Bureau, a voluntary association of oper-

ators of bituminous coal mines in the Freeport, Pittsburgh, and Connellsville districts of Pennsylvania and the individual members thereof, operators of bituminous coal mines and producers and shippers of bituminous coal in the Freeport, Pittsburgh, and Connellsville districts of Pennsylvania, being as follows:

Carnegie Coal Corporation, a corporation,
Chartiers Creek Coal Company, a corporation,
Clinton Block Coal Company, a corporation,
The Greensburg-Connellsville Coal & Coke Company, a corporation,
Hillman Coal & Coke Company, a corporation,
Jamison Coal Corporation, a corporation,
Keystone Coal & Coke Company, a corporation,
Langeloth Coal Company, a corporation,
Lindley Coal Company, a corporation,
McClane Mining Company, a corporation,
Ocean Coal Company, a corporation,
Pittsburgh Coal Company, a corporation,
South Fayette Coal Company, a corporation,
Union Collieries Company, a corporation,
Westmoreland Coal Company, a corporation,

and represent that they have a substantial interest in the [fol. 330] matters in controversy in the above-entitled proceeding and desire to intervene as a party thereto and to be represented therein by counsel.

And as grounds for said proposed intervention petitioners respectfully say:

I

That your individual petitioners in their business of operating bituminous coal mines in the Freeport, Pittsburgh, and Connellsville districts of Pennsylvania, produce and ship bituminous coal in interstate commerce to various destinations, including particularly destinations in northeastern Ohio.

II

That in the proceedings before the Interstate Commerce Commission styled No. 25566, Intrastate Rates on Bituminous Coal within the State of Ohio, and No. 25590, Western Pennsylvania Coal Traffic Bureau, et al. v. The Akron,

Canton & Youngstown Railway Company, et al., and the related cases, your petitioners were parties in interest, being complainants in No. 25590 and being interveners in No. 25566 and the related proceedings, and actively participated in said proceedings before the Commission, offered testimony, submitted briefs, and were heard at oral argument by counsel.

That in the proceedings before the Interstate Commerce Commission known as No. 25885, Surcharge on Bituminous Coal within the State of Ohio, your petitioners were parties in interest, being interveners, and actively participated in said proceedings, offered testimony, submitted briefs, and were heard at oral argument by counsel.

[fol. 331] III

That as producers and shippers of bituminous coal and as parties to said proceedings before the Interstate Commerce Commission in said No. 25586, No. 25590, and the related cases, also in No. 25885, your petitioners have an interest in any suit wherein is involved the validity of any order or requirement of the Interstate Commerce Commission respecting rates on bituminous coal from mines in the Freeport, Pittsburgh, and Connellsville districts of Pennsylvania, and from mines in districts in the State of Ohio to destinations in northeastern Ohio made and entered by the Interstate Commerce Commission in any such proceeding.

IV

That the petition of the plaintiffs herein, State of Ohio, and Public Utilities Commission of Ohio, seeks to enjoin, abrogate, cancel and set aside two certain orders entered by the Interstate Commerce Commission in said proceedings; and that under and by virtue of the District Court Jurisdiction Act, 38 Stat. L. 319, and under and by virtue of the Commerce Court Act, 36 Stat. L. 539, Sec. 5, any party or parties in interest to the proceedings before the Commission in which an order or requirement is made, may appear as parties thereto of their own motion and as of right and be represented by their counsel in any suit wherein is involved the validity of such order or requirement or any part thereof and the interest of such party.

[fol. 332] V

Your petitioners respectfully represent that the orders of the Interstate Commerce Commission made and entered in said proceedings are regular and valid and not in derogation of any legal right of the plaintiffs in this proceeding.

Wherefor, your petitioners having been parties in interest to said proceedings before the Interstate Commerce Commission and now having an interest which is involved herein, respectfully pray:

(a) That leave be granted them to intervene in, and be treated as parties hereto, with the right to have notice of, and to appear at the taking of testimony, to produce, examine, and cross-examine witnesses, and to be heard in person or by counsel upon brief and at oral argument;

(b) That due and proper service of this petition for intervention be forthwith made in the manner prescribed and provided for in said District Court Jurisdiction Act;

(c) That this Honorable Court make such other order or orders in respect to this petitioner's position upon the record and other procedural matters as may be appropriate.

Western Pennsylvania Coal Traffic Bureau, Carnegie Coal Corporation, Chartiers Creek Coal Company, Clinton Block Coal Company, The Greensburg-Connellsville Coal & Coke Company, Hillman Coal & Coke Company, Jamison Coal Corporation, Keystone Coal & Coke Company, Langeloth Coal Company, Lindley Coal Company, McClane Mining Company, Ocean Coal Company, Pittsburgh Coal Company, South Fayette Coal Company, Union Collieries Company, Westmoreland Coal Company, [fol. 333] by August G. Gutheim, 712 Jackson Place, Washington, D. C., Solicitor.

Duly sworn to by A. S. Boden. Jurat omitted in printing.

[fol. 334] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

[Title omitted]

ORDER ALLOWING INTERVENTION—Filed Jan. 13, 1934

On application duly made in open court, June 3, 1933, all of the parties being present and represented by counsel, it is ordered that leave be and the same is hereby granted, to Western Pennsylvania Coal Traffic Bureau and the individual members thereof, being Carnegie Coal Corporation, et al., to file their Petition of Intervention herein, and their Answer heretofore tendered in support of the validity of the orders of the Interstate Commerce Commission; and also to be, and they hereby are made parties to this cause.

By the Court:

Hough, J. Nevin, J.

[fol. 335] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

[Title omitted]

PETITION OF INTERVENTION—Filed June 3, 1933

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division.

Respectfully come your petitioners, Robert C. Hill, Frank R. Lyon, and Howell Fisher, domiciliary receivers of The Consolidation Coal Company, a corporation of Maryland; Robert C. Hill, Frank R. Lyon, and William H. Koch, ancillary receivers of The Consolidation Coal Company within the Northern District of West Virginia; and The Consolidation Coal Company by its domiciliary and ancillary receivers aforesaid, and represent to the court that they have a substantial interest in the matters involved in the above-entitled

proceeding adverse to the interest of the plaintiffs therein, and that they desire to intervene in said proceeding, to file an answer therein, and otherwise to participate in the conduct thereof; and for cause show:

I

That petitioner The Consolidation Coal Company is a corporation duly organized and existing under the laws of the State of Maryland, with its principal office in New York City; that petitioners Robert C. Hill, Frank R. Lyon, and Howell Fisher are the duly appointed, qualified, and acting receivers of said Company under order of the District Court of the United States for the District of Maryland entered June 2, 1932; that petitioners Robert C. Hill, Frank R. Lyon, and William H. Koch are the duly appointed, qualified, and acting ancillary receivers of said Company within the jurisdiction and under the order of the District Court of the United States for the Northern District of West Virginia entered June 3, 1932; and that by said order of June 2, 1932, and by orders entered in said courts on May 26, 1933, and on May 29, 1933, respectively, said primary or domiciliary receivers and said ancillary receivers were duly authorized to file and prosecute this petition. Said Company [fol. 336] and its domiciliary and ancillary receivers aforesaid are hereinafter referred to collectively as petitioners.

II

That the petitioner company owns and for many years has owned bituminous coal mines and mining properties in several States and more particularly in what is generally known as and hereinafter called the Fairmont district in northern West Virginia; that said company for many years prior to the appointment of its receivers as aforesaid was, and the said receivers since their appointment have been and are, engaged in operating said coal mines and in selling and shipping bituminous coal from said mines in interstate commerce; that the term Fairmont district as used in this petition means the Fairmont No. 1, Monongah, Short Line, Opekiska, and Clarksburg districts on The Baltimore and Ohio Railroad, the Fairmont district on the Western Maryland Railway, and those certain districts or groups variously known as Fairmont No. 2 district, Group C, and Group No.

3, on The Monongahela Railway, as more particularly described in tariffs of said carriers; and that among such tariffs are the following:

B. & O. Coal and Coke Series, I. C. C. No. 2620, as amended;
W. M. Ry., I. C. C. No. 8241, as amended;
P. & L. E., I. C. C. No. 2983, as amended;
P. R. R., AA.—I. C. C. No. 2035, as amended.

III

That the petitioners produce in said Fairmont district as above defined bituminous coal suitable for all purposes for which such coal is customarily used and, in volume, of many millions of tons annually; that for many years a very considerable tonnage of such coal has been shipped by petitioners to destinations in northeastern Ohio, that is, in that portion of Ohio generally east of a line drawn through Sandusky, Galion, and Columbus, and generally north of an east-and-west line drawn through Columbus.

IV

That in the proceedings before the Interstate Commerce Commission known as Docket No. 25566, Intrastate Rates on Bituminous Coal within the State of Ohio, Investigation and Suspension Docket No. 3801, Coal from Pennsylvania [fol. 337] to Northern Ohio, and Investigation and Suspension Docket No. 3833, Coal from Pennsylvania to Northern Ohio (2), your petitioners through counsel entered their appearances and thereby under that Commission's rules of practice became parties to such proceedings. That your petitioners are complainants in Docket No. 25670, Robert C. Hill, et al. v. A., C. & Y. Railway Co., et al., and interveners in three other proceedings then pending on complaint before the said Commission, to wit: Docket No. 25590, Western Pennsylvania Coal Traffic Bureau v. A., C. & Y. Railway Co., et al., Docket No. 25656, H. W. Showalter, et al. v. A., C. & Y. Railway Co., et al., and Docket No. 25657, Property Owners' Committee et al. v. A., C. & Y. Railway Co., all of which said complaints were consolidated for hearing and heard with the said Docket No. 25566, and Investigation & Suspension Dockets No. 3801 and No. 3833. That your petitioners through counsel entered their appearances in the

proceeding known as Docket No. 25885, Surcharge on Bituminous Coal within the State of Ohio, and thereby under the said Commission's rules of practice became parties to such proceeding. That your petitioners actively participated in all of the aforesaid proceedings, offered evidence, submitted briefs, and were heard in oral argument by counsel.

V

That as producers of coal and shippers thereof to destinations in northeastern Ohio, and as parties to all of said proceedings before the said Commission, your petitioners have an interest in any suit wherein is involved the validity of any order or orders or requirement of the said Commission made and entered in said proceedings or any of them.

VI

That by their bill the plaintiffs herein, the State of Ohio and Public Utilities Commission of Ohio, seek, under an act of Congress approved October 22, 1913, known as the District Court Jurisdiction Act, C. 32, 38 Stat. 219, U. S. C. Title 28, Section 41, to have this court enjoin, set aside, and annul a certain order entered by the said Commission on May 2, 1933, in its said Docket No. 25566, and a certain order entered by the said Commission May 9, 1933, in its said Docket No. 25885. That under said District Court Jurisdiction Act, and under and by virtue of the Commerce [fols. 338 & 339] Court Act approved June 18, 1910, 36 Stat. 539, Section 5, U. S. C. Title 28, Section 45a, any parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement, or of any part thereof, and the interest of such party.

VII

Your petitioners respectfully represent that the orders of the said Commission made in the said Dockets No. 25566 and No. 25885 are legal and valid and not in derogation of any legal right of the plaintiffs in this suit, or any of them.

Wherefore your petitioners, having been parties in interest in said Dockets No. 25566 and No. 25885 before the said

Commission, and having an interest which is involved herein, respectfully pray:

(1) That leave be granted them to intervene in, and be treated as parties to, this suit with right to have notice of, and to appear at, the taking of evidence, to produce, examine, and cross-examine witnesses; and to be heard in person or by counsel upon brief and in oral argument;

(2) That this Honorable Court make such other order or orders in the premises as to it may seem meet and appropriate.

Robert C. Hill, Frank R. Lyon, and Howell Fisher, Domiciliary Receivers of The Consolidation Coal Company, a Corporation of Maryland; Robert C. Hill, Frank R. Lyon, and William H. Koch, Ancillary Receivers of The Consolidation Coal Company Within the Northern District of West Virginia; and The Consolidation Coal Company by Its Domiciliary and Ancillary Receivers Aforesaid, by Henry C. Hall, Alex. M. Bull, Attorneys for Petitioners, 716 Jackson Place, N. W., Washington, D. C.

Duly sworn to by Robert C. Hill. Jurat omitted in printing.

[fols. 340 & 341] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

[Title omitted]

ORDER ALLOWING PETITION OF INTERVENTION—Filed Jan. 6, 1934

On application duly made in open court, all of the parties being present and represented by their counsel, it is ordered that leave be and same is hereby granted to Robert C. Hill, Frank R. Lyon, and Howell Fisher, domiciliary receivers of The Consolidation Coal Company, a corporation of Maryland; Robert C. Hill, Frank R. Lyon, and

William H. Koch, ancillary receivers of The Consolidation Coal Company within the Northern District West Virginia; and The Consolidation Coal Company by its domiciliary and ancillary receivers aforesaid, to file their petition of intervention, and their answer heretofore tendered in support of the validity of the orders of the Interstate Commerce Commission, and to be, and they hereby are, made parties to the cause.

By the Court:

Hough, Judge. Nevin, J.

Columbus, Ohio, Jany. —, 1933.

[fol. 342] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

[Title omitted]

ORDER ALLOWING PETITION OF INTERVENTION—Filed Jan. 13, 1934

On application duly made in open court, all of the parties being present and represented by their counsel, it is ordered that leave be and same is hereby granted to Robert C. Hill, and Howell Fisher, domiciliary receivers of The Consolidation Coal Company, a corporation of Maryland; Robert C. Hill, and William H. Koch, ancillary receivers of The Consolidation Coal Company within the Northern District West Virginia; and The Consolidation Coal Company by its domiciliary and ancillary receivers aforesaid, to file their petition of intervention and their answer heretofore tendered in support of the validity of the orders of the Interstate Commerce Commission, and to be, and they hereby are, made parties to this cause as of June 3, 1933, the date when said petition of intervention and answer were presented to and left with this court sitting in Columbus, Ohio.

By the Court:

Hough, J. Nevin, J.

[fol. 343] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Equity. No. 1039

[Title omitted]

PETITION OF INTERVENTION AND MOTION TO DISMISS A PORTION OF THE BILL OF COMPLAINT—Filed June 3, 1933

To the Honorable, the Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

And now, this 3d day of June 1933, comes The Public Service Commission of the Commonwealth of Pennsylvania, by its counsel, under the provisions of Sections 212 and 213 of the Judicial Code, 36 Stat. 1150, 1151, 38 Stat. 220, U. S. C. Tit. 28, Section 45a, to intervene and appear specially as a party respondent in the above entitled suit, for the sole purpose of objecting to the venue as to that portion of the Bill of Complaint which seeks an order or injunction restraining the United States of America and the Interstate Commerce Commission from enforcing the order of the Interstate Commerce Commission made in a proceeding known as No. 25885, Surcharge on Bituminous Coal Within the State of Ohio, under date of May 9, 1933; and as grounds therefor, it shows:

1. The Public Service Commission of the Commonwealth of Pennsylvania, your orator, is an administrative body or commission established for the purpose of regulating public service companies and of carrying out the provisions of the Act of Assembly approved July 26, 1913, P. L. 1374, under which Act your orator was organized according to law.

[fol. 344] 2. This action before your Honorable Court is a suit to suspend or set aside, in whole or in part, the order of the Interstate Commerce Commission in a proceeding known as No. 25885, Surcharge on Bituminous Coal Within the State of Ohio, bearing date of May 9, 1933. A copy of said order and the accompanying report are attached to and made a part of the Bill of Complaint in this matter, and marked Exhibit "B".

3. Said order of the Interstate Commerce Commission was entered in a proceeding before the Interstate Commerce Commission, duly commenced and concluded on petition filed with the Interstate Commerce Commission by your orator, the Public Service Commission of the Commonwealth of Pennsylvania. A certified copy of said petition is attached hereto, made a part hereof and marked Exhibit "A".

4. The Public Service Commission of the Commonwealth of Pennsylvania was a party to said proceedings before the Interstate Commerce Commission, appeared at the hearings, presented evidence at the hearings, filed briefs and participated in the oral argument.

5. The Act of October 22, 1913, c. 32, 38 Stat. 219, U. S. C., Tit. 28, Sec. 43, provides:

"Venue of suits relating to orders of Interstate Commerce Commission. The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment."

[fol. 345] 6. The office, headquarters and residence of your orator, The Public Service Commission of the Commonwealth of Pennsylvania, is at Harrisburg, Pennsylvania, which is in the judicial district of the United States District Court for the Middle District of Pennsylvania.

7. There was no petitioner in the above proceeding before the Interstate Commerce Commission, who or which resided or now resides in the judicial district of the United

States District Court for the Southern District of Ohio, Eastern Division.

8. Inasmuch as the plaintiff by its Bill of Complaint undertakes to suspend or set aside, in whole or in part, the above order of the Interstate Commerce Commission through the injunctive process of your Honorable Court, the venue of this action in so far as it seeks to suspend or set aside the above order of the Interstate Commerce Commission is not in the United States District Court for the Southern District of Ohio, Eastern Division, but is in the United States District Court for the Middle District of Pennsylvania.

Wherefore, The Public Service Commission of the Commonwealth of Pennsylvania prays that an order be entered dismissing that portion of the Bill of Complaint which seeks to suspend or set aside the order of the Interstate Commerce Commission made in proceedings known as No. 25885, Surcharge on Bituminous Coal Within the State of Ohio, for want of proper venue.

The Public Service Commission of the Commonwealth of Pennsylvania, by E. Everett Mather, Jr., Assistant Counsel. John Fox Weiss, Counsel.

[fol. 346] *Duly sworn to by Louis Tevell. Jurat omitted in printing.*

[fol. 347] EXHIBIT "A" TO PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

In the Matter of the Continuation of Existing Surcharges on Rates on Bituminous Coal Between Points in the State of Ohio

Docket No. —

Petition of the Public Service Commission of the Commonwealth of Pennsylvania

Comes now The Public Service Commission of the Commonwealth of Pennsylvania and files this, its petition, requesting the Interstate Commerce Commission to initiate

an investigation of the rates applicable on bituminous coal between points within the State of Ohio as a result of the action of the Public Utilities Commission of the State of Ohio refusing to permit to be added to said rates increases therein in conformity with those allowed interstate by your Honorable Commission at Ex Parte 103, and in support thereof respectfully shows:

1. The Public Service Commission is the duly constituted authority of the Commonwealth of Pennsylvania for the purpose of the regulation of the rates, and of certain other activities of the public service companies operating within the said Commonwealth, and the protection of the rights of the citizens and residents of the said Commonwealth in their relations with the said public service companies. Its powers and duties are defined by The Public Service Company Law of Pennsylvania, the Act of July 26, 1913, P. L. 1374, and the acts amendatory thereof and supplementary thereto. In Section 11 of Article V of the said Act, it is provided:

"The Commission may investigate the rates of interstate traffic facilities or service of common carriers within this Commonwealth, and when such rates, facilities, or service are, in the determination of the commission, unjust, unreasonable, or unjustly discriminatory, or unduly [fol. 348] or unreasonably preferential, or in violation of the interstate commerce law, or in conflict with the rulings, orders, or regulations of the Interstate Commerce Commission, the commission may apply by petition to the said Interstate Commerce Commission for relief, or may present to the said Interstate Commerce Commission all facts coming to its knowledge as to the violation of the rules, orders, or regulations of that commission, or as to the violation of the interstate commerce law."

2. As a result of various decisions rendered by the Public Utilities Commission of Ohio and the actions of the several rail carriers in compliance therewith and voluntarily extending the principles enunciated therein to shipments made from other originating points within the State of Ohio, the previously existing differential of 10c per ton on bituminous coal, applicable to shipments from bituminous coal producing points in western Pennsylvania to destinations in northeastern Ohio, as compared with simi-

lar intrastate shipments from points within Ohio, has been increased to 39¢. The justness and reasonableness of said rates and the differential created thereby is now under consideration by your Honorable Commission in investigation proceedings at Docket No. 25566, and related cases, in which the Public Service Commission of Pennsylvania has appeared as a party protestant. Reference herein is respectfully made to the pleadings and testimony of record in said proceedings, which set forth with particularity the rates and relationships involved.

3. That your Honorable Commission by action dated March 7, 1933, at Ex Parte 103 has extended to September 30, 1933, the existing surcharges which has applied to the shipments here in question amount to 6¢ per ton.

4. That the Public Utilities Commission of Ohio by action dated March 20, 1933, refused to permit the existing surcharges to be continued after April 1, 1933, as applied to shipments between points within the State of Ohio.

[fol. 349] 5. That the effect of the respective actions by your Honorable Commission and the Public Utilities Commission of the State of Ohio is to increase the existing differential of 39¢ against shippers of bituminous coal consigned from producing points in Western Pennsylvania, to a total of 45¢.

6. The foregoing changes in the rate structure are believed to create undue preference in favor of producers and shippers of bituminous coal located in the State of Ohio, and against producers and shippers of bituminous coal located in the Commonwealth of Pennsylvania, and against the interstate commerce in coal from said producing points in Pennsylvania.

Wherefore your petitioner prays that your Honorable Commission enter an order forthwith instituting an investigation with respect to the matters and things set forth in paragraphs 3 to 6 inclusive hereof, in order that it may determine whether there is preference in favor of certain producers and shippers of bituminous coal in the State of Ohio, and prejudice against producers and shippers of bituminous coal located in the Commonwealth of Pennsylvania and after said investigation is concluded, make such findings and orders as may be appropriate to establish non-prejudicial and non-preferential rates on bitumi-

nous coal moving between the points hereinbefore referred to. Your petitioner further prays that your Honorable Commission likewise enter an order forthwith suspending in so far as it applies to the transportation of bituminous coal interstate between the points herein referred to, the order of your Honorable Commission at Ex Parte 103, dated March 7, 1933, until such time as final action may be taken by your Honorable Commission herein.

The Public Service Commission of the Commonwealth of Pennsylvania, (Signed) Clyde L. King, Chairman.

[fols. 350 & 351] *Duly sworn to by Louis Tevell. Jurat omitted in printing.*

[fols. 352 & 353] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

[Title omitted]

ORDER ALLOWING INTERVENTION—Filed Jan. 13, 1934

It is hereby ordered that The Public Service Commission of the Commonwealth of Pennsylvania may intervene in this case as a party defendant, as of June 3, 1933.

Hough, J. Nevin, J.

January —, 1934.

[fols. 354 & 355] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

[Title omitted]

ANSWER OF WESTERN PENNSYLVANIA COAL TRAFFIC BUREAU ET AL., INTERVENING DEFENDANTS, TO BILL OF COMPLAINT—Filed Jan. 6, 1934

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

Come now Western Pennsylvania Coal Traffic Bureau, et al., intervening defendants herein, and by way of first

answer to the bill of complaint herein, adopt the answer of Interstate Commerce Commission, defendants herein to said bill of complaint.

All of which matters and things the said intervening defendants are ready to aver, maintain, and prove as this Honorable Court shall direct and hereby prays that said bill of complaint be dismissed.

Western Pennsylvania Coal Traffic Bureau et al., by August G. Gutheim, 712 Jackson Place, Washington, D. C., Solicitor.

Duly sworn to by A. S. Boden. Jurat omitted in printing.

[fol. 356] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

In Equity. No. 1040

[Titles omitted]

AFFIDAVIT OF W. P. BUFFINGTON, TRAFFIC MANAGER, PITTSBURGH COAL CO.—Filed June 3, 1933

W. P. Buffington, being duly sworn, says he is Traffic Mgr. of the Pittsburgh Coal Company with office at Pittsburgh, Pennsylvania and has been for more than ten years last past.

That in his duties as said traffic manager he is required to be informed and is informed concerning the daily sales and shipments of the Pittsburgh Coal Company in all markets to which it ships bituminous coal.

That commencing August 1, 1932 contemporaneous with the reductions in rates on bituminous coal from Ohio mines to northeastern Ohio destinations the sales and shipments of the Pittsburgh Coal Co. in said markets greatly declined; that such decline in sales and shipments was testified to before the Interstate Commerce Commission in its proceeding entitled No. 25,566, Intra-state rates on bituminous coal within the state of Ohio, by witness Striebel; that such statement is summarized in the report of said

commission in said proceeding at mimeographed sheets 6 and 7.

That the losses in business of the Pittsburgh Coal Company in said northeastern Ohio markets so testified to and so recited by the commission in its report have continued and are now continuing, and that such business has not been regained and will not be regained so long as the present relationship of rates from Ohio mines and from western Pennsylvania mines continues, on account of the inability of said Pittsburgh Coal Company to absorb the handicap in such rates in the sales price of its coal in said markets.

W. P. Buffington.

STATE OF OHIO,
County of Franklin, ss:

Personally appeared before me, W. P. Buffington, and subscribes and swears to the statement above as true.

Margaret E. Pfefferle, Notary Public. Commission expires Nov. 25, 1934. (Notarial Seal, Franklin County, Ohio.)

[fol. 357] [File endorsement omitted]

In Equity. No. 1039.

[Title omitted]

ANSWER TO BILL OF COMPLAINT—Filed Jan. 6, 1934

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

Come now Robert C. Hill, Frank R. Lyon, and Howell Fisher, domiciliary receivers of The Consolidation Coal Company, a corporation of Maryland; Robert C. Hill, Frank R. Lyon, and William H. Koch, ancillary receivers of The Consolidation Coal Company within the Northern District of West Virginia; and The Consolidation Coal Company by its domiciliary and ancillary receivers aforesaid, intervening defendants herein, and for their answer to the petition or bill of complaint of the plaintiffs in the above-entitled suit, say:

I

That they adopt and make their own the answer of defendant The Interstate Commerce Commission to said bill of complaint with like effect as if each admission, denial or averment made by said defendant in its said answer were here made by these intervening defendants, and here set forth at length.

II

That, further answering said bill of complaint, these intervening defendants aver that the granting of said restraining order, temporary injunction, and/or permanent injunction, as prayed for in said bill of complaint, will cause great and irreparable damage and injury to these intervening defendants by diverting business from them to the producers of coal in Ohio with whom they are in competition in the sale of coal to purchasers of coal in northeastern Ohio.

All of which matters and things these intervening defendants are ready to aver, maintain, and prove as the Judges of this Honorable Court shall direct.

[fols. 358 & 359] Wherefore, these intervening defendants pray that the granting of said restraining order, of said temporary injunction, and of said permanent injunction, be severally denied; that the bill of complaint be dismissed; that these intervening defendants be allowed their reasonable costs; and for such further and general relief as to equity pertains.

Robert C. Hill, Frank R. Lyon, and Howell Fisher, Domiciliary Receivers of The Consolidation Coal Company, a Corporation of Maryland; Robert C. Hill, Frank R. Lyon, and William H. Koch, Ancilliary Receivers of The Consolidation Coal Company within the Northern District of West Virginia; and The Consolidation Coal Company by Its Domiciliary and Ancillary Receivers Aforesaid, by Henry C. Hall, Alex. M. Bull, Attorneys for Petitioners, 716 Jackson Place, N. W., Washington, D. C.

Duly sworn to by Robert C. Hill. Jurat omitted in printing.

[fol. 360] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

In Equity. No. 1040

[Titles omitted]

[File endorsement omitted]

AFFIDAVIT OF J. NOBLE SNIDER, GENERAL MANAGER OF SALES, RECEIVERS OF THE CONSOLIDATION COAL COMPANY—Filed June 3, 1933.

STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me, J. M. Wollmer, a notary public, in and for the County of New York, State of New York, J. Noble Snider, who, being duly sworn, deposes and says:

That he is General-Manager of Sales for the Receivers of the Consolidation Coal Company, and as such has charge of the sales of coal for the Receivers. That he has been General Manager of Sales for The Receivers since June 2, 1932, and prior to that time Vice-President in Charge of Sales for the Consolidation Coal Company since January 1, 1930.

The Consolidation Coal Company is in the hands of Receivers and for convenience the Company and its Receivers are hereinafter referred to collectively as The Consolidation.

The Consolidation is a large and important producer of coal in the Fairmont District, located in northern West Virginia. In that District it owns approximately 80,000 acres of mineral lands and holds under lease an additional 24,000 acres. It also owns and operates other mines producing bituminous coal in eastern Kentucky, Pennsylvania and Maryland.

At one time the Company operated approximately seventy-five mines in the Fairmong District but now its Receivers operate there only eight mines, having aggregate daily production capacity of about 12,000 tons, or 3,600,000

[fol. 361] tons annually, an aggregate which could be readily and substantially increased, if sufficient business was available. These mines are developed to produce coal from the Pittsburgh Seam only and The Consolidation's production in this District represents 30% to 40% of the total coal produced by The Consolidation in all its operating divisions.

The Consolidation ships approximately ten percent of its commercial shipments from the Fairmont District into northeastern Ohio territory where it encounters very severe competition from producers of coal in Ohio No. 8 District in the State of Ohio. Substantially all mines in Ohio No. 8 District operate in the same Pittsburgh Seam. The Ohio No. 8 District enjoys freight rates differentially lower than rates from the Fairmont District to northeastern Ohio territory.

Immediately prior to August 1, 1932, the rate per ton from Fairmont District to Cleveland, Ohio, one of the most important points in northeastern Ohio, was $1.99 and from Ohio No. 8 District $1.74, both exclusive of the emergency charge of 6¢ per ton then in effect both from Fairmont and Ohio Districts. On August 1, 1932 certain of the railroads serving the Ohio No. 8 District and on subsequent dates other carriers serving that district, reduced the rate to Cleveland, Ohio, by 29¢ per ton, that is to $1.45, exclusive of surcharge.

Prior to August 1, 1932, the rates per ton to Cleveland, Ohio from Fairmont District were 25¢ per ton higher than from the Ohio No. 8 District. From August 1, 1932, to March 31, 1933, they were 54¢ per ton higher. Effective April 1, 1933, due to the refusal of the Public Utilities Commission of Ohio to permit the continued application of the 6¢ per ton emergency charge on Ohio intrastate coal traffic, the rates from Fairmont have been since that date and are now 60¢ per ton higher than from the Ohio No. 8 District.

The Consolidation produces a good grade of Pittsburgh Seam coal which is subjected to a thorough and careful preparation, (an important factor to the consumer in measuring the value of its coal in comparison with competing coals). As a result of this preparation The Consolidation, despite the liquidation of coal prices throughout several years, the vicious fight for markets within the bituminous coal industry, the keen and oft-times unscrupulous competition prevalent among coal operators having access to common markets, did, prior to August 1, 1932, sell and ship approximately

10% of its commercial shipments from the Fairmont District [fol. 362] to markets within the northeastern Ohio territory. The increased spread in the rate to Cleveland, Ohio, for example, of 29¢ in the already existing spread of 25¢ in the rate on bituminous coal applicable from the Ohio and the Fairmont Districts, respectively both producing substantially the same type of coal, added such a heavy competitive burden as to make it practically impossible for The Consolidation in the marketing of its coal produced in the Fairmont District, to overcome the freight rate advantage enjoyed by the Ohio districts. The disadvantage of Fairmont was more than doubled with the effectiveness of the increased spread in the rates as of August 1, 1932.

Early in August, 1932, The Consolidation, based upon its previous business experience of many years in the northeastern Ohio market, estimated that on the original differential freight rate basis of 25¢ per ton over Ohio No. 8 District, its reasonable expectancy of general purpose, steam and domestic coal business from the standpoint of contract business still to be secured, plus contract business already on its books and spot sales to be made during the period August 1, 1932 to March 31, 1933, the latter date generally accepted as the close of the contract year, would be approximately 200,000 tons, or roughly from 20,000 to 30,000 tons per month for the eight months period. Despite all The Consolidation has been able to do in the interim, all the sacrifices it has made and notwithstanding the helpful attitude of some of its customers, The Consolidation, up to the end of May, 1933, has lost approximately 200,000 tons of general purpose, steam and domestic business within the northeastern Ohio consuming territory, or roughly on an average of 19,000 to 20,000 tons per month for the ten months period from August 1, 1932 to May 31, 1933 and in affiant's considered judgment loss of business at this rate will continue as long as the existing spread in the rates from Ohio No. 8 District on the one hand and the Fairmont District on the other, continues.

Of the business formerly done by The Consolidation in northeastern Ohio which it has lost since August 1, 1932, a very large portion has been lost to producers in Ohio No. 8 District because of the increase in the spread from 25¢ to 54¢ and later to 60¢ per ton.

The Commission, on sheets Nos. 27 and 28 of its report in Docket No. 25566 Exhibit "A" to the Bill of Complaint,

refers to a large contract which The Consolidation had and [fols. 363 & 364] which expired on December 31, 1932, and which was not renewed because of the Ohio freight rates. The loss of this contract was actually caused by the reduction in the Ohio rates and caused a loss to The Consolidation of approximately 7,000 tons a month.

The Consolidation for many years had sold to the North Western Fuel Company, one of its wholly owned subsidiaries, that Company's entire requirements of vessel fuel coal to be supplied to vessels at Cleveland, Lorain and Toledo, Ohio. The portion of the fuel coal supplied to vessels at Cleveland and Lorain, Ohio which had been shipped from The Consolidation mines in the Fairmont District amounted to approximately 10,000 tons each season of navigation. The balance of the fuel coal supplied these vessels at Toledo approximating 21,000 tons had been shipped from mines of The Consolidation in the Elkhorn District of eastern Kentucky.

For that portion of the 1932 Lake Season remaining after August 1, 1932 up to approximately December 1, 1932, a preponderance of such vessel fuel requirements was purchased by the North Western Fuel Company from operators in the Ohio No. 8 District, and for the Lake Season 1933 beginning approximately April 1, that Company entered into a contract with an operator in the Ohio No. 8 District for its entire requirements approximating 25,000 tons.

J. Noble Snider.

Subscribed to in my presence and sworn to before me in the County of New York, State of New York by the affiant above named, this 2nd day of June, 1933.

John M. Wollmer, Notary Public, Queens Co. No. 2083, Reg. No. 1536. Certificate filed in New York Co. No. 202, Reg. No. 4-W-124. Commission expires March 30, 1934. (Seal of J. M. Wollmer, Notary Public, Queens County.)

[fol. 365] [File endorsement omitted]

[fol. 366] IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

[Title omitted]

INTERLOCUTORY INJUNCTION—Filed July 7, 1933

This cause came on for hearing on the application and notice of plaintiffs for an interlocutory injunction and was argued by counsel and submitted to the court; and thereupon the parties in open court stipulated and agreed to submit the cause for final hearing; thereupon the cause came on for final hearing and for a permanent injunction upon the pleadings and evidence and was argued by counsel and the court fixed Saturday, June 24, 1933 for the filing of briefs by all parties and final submission of the cause; thereafter the Interstate Commerce Commission, upon its own motion, at the request of this court stayed the effective date of its two orders herein complained of until July 10, 1933, but it appearing now that a final decision cannot be rendered by this court as of that date and this court being of the opinion that pending final determination of this suit, plaintiffs are entitled to the preliminary relief prayed for,

It is ordered, adjudged and decreed that the order of the Interstate Commerce Commission of May 2, 1933, in No. 25566, Intrastate Rates on Bituminous Coal in the State of Ohio, and the order of May 9, 1933, in No. 25885, Surcharge on Bituminous Coal within the State of Ohio, and the operation of said orders, be and the same hereby are restrained and suspended until the further order of this court.

——— ———, Judge, Cir. Ct. of App. Robert R. Nevin, District Judge. Benson W. Hough, District Judge.

July 7, 1933.

[fols. 367 & 368] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

ORDER SUBSTITUTING EMPIRE SHEET & TIN PLATE COMPANY AS INTERVENING PETITIONER IN PLACE OF C. H. HENKEL, RECEIVER—Filed Jan. 19, 1934

On petition of Empire Sheet & Tin Plate Company to be substituted for C. H. Henkel, Receiver, Empire Steel Corporation, as intervening petitioner,

It is hereby ordered that said petition is granted and Empire Sheet & Tin Plate Company is hereby substituted as intervening petitioner in place of C. H. Henkel, Receiver, Empire Steel Corporation, in this cause.

Hough, Judge.

Dated January —, 1934.

[fol. 369] [File endorsement omitted]

[fol. 370] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Equity. No. 1040

THE WHEELING AND LAKE ERIE RAILWAY COMPANY, a Corporation,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

PETITION TO ENJOIN, ETC., ORDERS OF INTERSTATE COMMERCE COMMISSION—Filed May 22, 1933

To the Honorable the Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

The Wheeling and Lake Erie Railway Company, plaintiff herein, complains of United States of America and the

Interstate Commerce Commission, defendants herein, and says:

(1) That it is a railroad corporation organized and existing under the laws of the State of Ohio and that it owns and operates lines of steam railway in said state in interstate and intrastate commerce and that it is largely engaged in hauling bituminous coal in intrastate commerce as a common carrier from mines located on its lines in what are known as the Ohio No. 8, Middle-Coshocton and Massillon districts in eastern Ohio, over its own lines or partly over its own lines and partly over the lines of connecting carriers to destinations including Canton, Massillon, Akron, Huron, Lorain and Cleveland and intermediate points in the State of Ohio. Plaintiff hauls relatively little coal from mines in other states to said destinations. Plaintiff enjoys high credit and for many years past has been, and now is, and unless its business is ruined by the unlawful interferences therewith of defendant the Interstate Commerce Commission, as hereinafter set forth, it will continue to be able to pay its current indebtedness and to meet all obligations to the owners of its funded debt.

[fol. 371] (2) Plaintiff brings this suit in equity against the United States of America and the Interstate Commerce Commission under an Act of Congress approved October 22, 1913, known as the District Court Jurisdiction Act, 38 Stat. L. 319, to enjoin, set aside and annul a certain order made by the Interstate Commerce Commission in a proceeding known as No. 25566, Intrastate Rates on Bituminous Coal within the state of Ohio, bearing date May 2, 1933, and to enjoin the enforcement of said order; and to enjoin, set aside and annul another certain order made by the Intersate Commerce Commission in a proceeding known as No. 25885, Surcharge on Bituminous Coal Within the State of Ohio, bearing date May 9, 1933, and to enjoin the enforcement of said order. The Interstate Commerce Commission is hereinafter referred to as the "Commission". Copy of the order (as corrected) in said No. 25566 and the accompanying report, marked "Exhibit A", and copy of the order in said No. 25885 and the accompanying report, marked "Exhibit B", are hereto attached and by reference made a part hereof.

(3) The orders herein complained of were not made upon the petition of any party hereto and the matter complained of in the petitions before the Commission in the proceedings in which said orders were made was the alleged effect upon interstate commerce of rates made or controlled by authority of the State of Ohio for the transportation by railroad in intrastate commerce of bituminous coal shipped from mines in the State of Ohio, including mines in the Southern District, Eastern Division, thereof.

(4) That bituminous coal is produced at and shipped from mines in various mining districts in eastern Ohio known as the Massillon, Middle, Ohio No. 8 and Cambridge districts and in southern Ohio known as the Hocking, Crooksville and Pomeroy districts, to destinations in Ohio and other states of the United States, including among others destinations in northeastern Ohio, particularly Canton, Massillon, Mansfield, Akron, Cleveland, Lorain and Huron. Bituminous coal is likewise produced at and shipped from mines in numerous mining districts in western Pennsylvania, West Virginia, eastern Kentucky, east-[fol. 372] ern Tennessee and western Virginia and shipped to the same destinations. These coals are of various kinds and qualities but for the purposes for which coals produced in said Ohio districts are used in the said destination territory in northeastern Ohio all of said coals from all of the districts in the states referred to are in competition with one another in said destination territory.

(5) That the State of Ohio, by virtue of its sovereign powers and under its constitution regulates rates for the transportation of property by railroad between points within its borders, and such regulation is conducted in accordance with powers duly vested in the Public Utilities Commission of Ohio, hereinafter referred to as the "Ohio Commission."

(6) That pursuant to said powers the Ohio Commission, after full hearing and investigation, on June 30, 1932, made and issued a report and order in a proceeding before it known as No. 7252, Republic Steel Corporation vs. The Baltimore & Ohio Railroad Company, et al., hereinafter referred to as the "Republic case," copy of which report and order, marked "Exhibit C" is attached hereto and by

reference made a part hereof. Said report and order prescribed maximum reasonable rates on bituminous coal in carloads from the Massillon, Middle-Coshocton and Ohio No. 8 districts in eastern Ohio to Canton and Massillon, Ohio, in the following amounts:

(1) From Brewster (Massillon City No. 8 mine), 60 cents to Massillon and 72 cents to Canton, Ohio;

(2) From North Industry (Black Oak mine No. 2), 60 cents to Canton and 80 cents to Massillon, Ohio;

(3) From all mines and shipping points in the Massillon and Middle-Coshocton districts, except Brewster and North Industry, 80 cents to Canton and Massillon, Ohio.

(4) From all mines and shipping points in the Ohio No. 8 districts, 108 cents to Canton and Massillon, Ohio,

[fol. 373] to which the temporary emergency charge of 6 cents per net ton, as authorized in the Ohio Commission's order of December 29, 1931, in Docket No. 7245 was authorized to be added. The shipments to which the above rates apply are all in commerce wholly within the State of Ohio. Said rates were duly published and became effective on August 1, 1932, have been continuously in effect since that date, and are in effect today. Said report and order have not been vacated or modified by the Ohio Commission, or stayed, set aside, or annulled by the Ohio courts, and are today in full force and effect.

(7) That also pursuant to said powers, the Ohio Commission, after full hearing and investigation, on July 25, 1932, made and issued a report and order in another proceeding before it, known as No. 7036, Empire Steel Corporation vs. The Baltimore & Ohio Railroad Company, hereinafter referred to as the "Empire case," copy of which report and order, marked "Exhibit D," is attached hereto and by reference made a part hereof. Said report and order prescribed a maximum reasonable rate on bituminous coal in carloads from the Cambridge district to Mansfield, Ohio, of not to exceed $1.51 per net ton, to which the temporary emergency charge of 6 cents per net ton, as authorized in the Ohio Commission's order of December 29, 1931, in Docket No. 7245 was authorized to be added. The ship-

ments to which the above rates apply are all in commerce wholly within the State of Ohio. Said rate was duly published and became effective on August 20, 1932, has been continuously in effect since that date, and is in effect today. Said report and order have not been vacated or modified by the Ohio Commission or stayed, set aside, or annulled by the Ohio courts, and are today in full force and effect.

[fol. 374] (8) That on March 31, 1933, by virtue of the provisions of the tariffs naming the 6 cents per ton emergency charge, referred to in paragraphs 5 and 6 hereof, said emergency charge automatically expired, and tariffs filed by the carriers herein referred to extending the same to September 30, 1933, were suspended by the Ohio Commission and are now under investigation by said Commission in a proceeding entitled Investigation and Suspension Docket No. 139, Proposed Emergency Charges on Ohio Intrastate Traffic, now pending and undecided.

(9) That after the issuance of the report and order in the Republic case, plaintiff, being one of the defendants therein, on application duly made, was granted authority by the Ohio Commission to establish upon less than statutory notice rates from mines on its line in the Massillon, Middle-Coshocton and Ohio No. 8 districts to Akron, Cleveland, Lorain and Huron on the lines of plaintiff, The Lorain & West Virginia Railway Company and The Akron, Canton & Youngstown Railway Company, on the same basis as the rates prescribed by the Ohio Commission in the Republic case. Said rates were as follows:

From Massillon District to Akron 87 cents, to Cleveland $1.08, to Lorain $1.08, to Huron $1.15.

From Middle Coshocton District to Akron $1.01, to Cleveland $1.22, to Lorain $1.28, to Huron $1.34.

From the Ohio No. 8 District to Akron $1.28, to Cleveland $1.45, to Lorain $1.45, to Huron $1.55.

Said authority was contained in the Ohio Commission's special permission No. 6492 and Supplement No. 1 thereto, a copy of which, marked "Exhibit E," is attached hereto and by reference made a part hereof. The shipments to which the above rates apply are all in commerce wholly within the State of Ohio. Said rates were duly published and became effective on August 1, 1932, have been continuously in effect since that date and are in effect today.

[fol. 375] (10) That immediately following the reductions referred to in paragraph 5 hereof, The Pittsburgh & West Virginia Railway Company, also one of the defendants in the Republic case, on application duly made, was granted authority by the Ohio Commission to establish upon less than statutory notice, rates from mines on its line in the Ohio No. 8 district in the same amounts and to the same destinations as those established by the plaintiff, as described in paragraph 9 hereof. The shipments to which the above rates apply are all in commerce wholly within the State of Ohio. Said rates were duly published and became effective on August 12, 1932, have been continuously in effect since that date and are in effect today.

(11) That after the reductions referred to in paragraphs 9 and 10 hereof had become effective, as alleged, The Baltimore & Ohio Railroad Company, The New York Central Railroad Company and The Pennsylvania Railroad Company, also defendants in the Republic case, on application duly made, were granted authority by the Ohio Commission to establish, upon less than statutory notice, rates from mines on their respective lines in the Massillon, Middle-Coshocton and Ohio No. 8 districts, in substantially the same amounts and to the same destinations, (including Rocky River in addition thereto), as established by the plaintiff, as alleged in paragraph 9 hereof. The shipments to which the above rates apply are all in commerce wholly within the State of Ohio. Said rates were duly published and became effective on September 2, 1932, have been continuously in effect since that date and are in effect today.

(12) That the rates fixed or authorized by the Ohio Commission, as hereinbefore set forth, so far as they relate to shipments from mines in the Ohio No. 8, Middle-Coshocton and Massillon districts to Canton, Massillon, Akron, Lorain, Huron and Cleveland, and intermediate points in the State of Ohio, were and are maximum, reasonable rates. It was necessary to reduce said rates from the amounts theretofore established to protect producers of bituminous coal in said Ohio No. 8, Middle-Coshocton and Massillon districts from undue and unreasonable prejudice and to prevent undue and unreasonable preference and advantage to pro-
[fol. 376] ducers and shippers of bituminous coal in interstate commerce from mines in southern West Virginia, east-

ern Kentucky, Tennessee and Virginia to the destinations to which said rates relate and to permit of the movement from said Ohio districts on the lines of plaintiff to said destination territory, of coal in sufficient volume to permit of the profitable operation of plaintiff's railroad and to prevent the loss of plaintiff's revenue due to the decline of shipments from said Ohio districts on its line to said destinations.

(13) That pursuant to the powers duly vested in it, the Ohio Commission, after full hearing and investigation, on September 15, 1932, made and issued a report and order in a proceeding before it known as No. 8072, In re Investigation of Rates on Bituminous Coal From the Cambridge, Crooksville and Hocking Districts, copy of which report and order, marked "Exhibit F," is attached hereto and by reference made a part hereof. Said report and order required the Baltimore & Ohio Railroad Company, the Pennsylvania Railroad Company, The New York Central Railroad Company and plaintiff to cease and desist from publishing, demanding, or collecting for the transportation of bituminous coal in carloads from mines in the Cambridge district to Cleveland, Lorain, Huron, Akron, Orrville and Rocky River, Ohio, and points intermediate thereto, rates which exceed the rates contemporaneously maintained from the Ohio No. 8 district to said destinations, and from mines in the Hocking and Crooksville districts rates which exceed the rates contemporaneously maintained from the Ohio No. 8 district to said destinations by a greater number of cents per net ton than prior to the reductions from the Ohio No. 8 district hereinbefore referred to. The shipments to which the above rates apply are all in commerce wholly within the State of Ohio. Said rates were duly published and became effective on September 29, 1932, have been continuously in effect since that date, and are in effect today. Said report and order have not been vacated or modified by the Ohio Commission, or stayed, set aside, or annulled by the Ohio courts, and are today in full force and effect.

[fol. 377] 14. That pursuant to the powers duly vested in it, the Ohio Commission, after full hearing and investigation, on October 18, 1932, made and issued a report and order in a proceeding before it known as No. 8097, In re Investigation of Rates on Bituminous Coal From the

Pomeroy District, copy of which report and order, marked "Exhibit G" is attached hereto and by reference made a part hereof. Said report and order required The New York Central Railroad Company and other carriers joining it in the establishment of joint through rates on bituminous coal from mines on the New York Central Railroad in the Pomeroy district to cease and desist from publishing, demanding, or collecting rates for the transportation of bituminous coal in carloads from mines in the Pomeroy district to Cleveland, Lorain, Huron, Akron, Orrville and Rocky River, Ohio, and points intermediate thereto, which exceed the rates contemporaneously maintained from the Ohio No. 8 district to said destinations by a greater number of cents per net ton than prior to the reductions from the Ohio No. 8 district hereinbefore referred to. The shipments to which the above rates apply are all in commerce wholly within the State of Ohio. Said rates were duly published and became effective on October 28, 1932, have been continuously in effect since that date, and are in effect today. Said report and order have not been vacated or modified by the Ohio Commission, or stayed, set aside, or annulled by the Ohio courts, and are today in full force and effect.

(15) That by order of October 3, 1932, first supplemental order of October 28, 1932, and second supplemental order of December 7, 1932, the Commission instituted the investigation hereinbefore referred to entitled No. 25566, Intrastate Rates on Bituminous Coal within the State of Ohio. After the Commission had held lengthy hearings therein and had received a large amount of evidence and had heard the parties including plaintiff by counsel upon brief and in argument, the Commission issued a report and order therein dated May 2, 1933, being the same report and order referred to in paragraph 1 hereof, copy of which is attached hereto as "Exhibit A". Said order by its terms requires all carriers by railroad operating within [fol. 378] the State of Ohio, including plaintiff, which were made respondents in said proceeding, on or before June 10, 1933, to increase their rates from mines in the Ohio No. 8, Middle, Massillon, Cambridge, Crooksville, Hocking and Pomeroy districts to destinations in northeastern Ohio, east of a line drawn through Sandusky, Galion and Columbus and north of an east and west line drawn

through Columbus, including Canton, Massillon, Mansfield, Cleveland, Lorain, Huron, Akron, Orrville, Rocky River and intermediate points, to the amounts in effect immediately prior to August 1, 1932.

(16) That by order of March 29, 1933, the Commission instituted the investigation hereinbefore referred to entitled No. 25885, Surcharge On Bituminous Coal Within the State of Ohio. After the Commission had held a hearing therein, in the course of which the evidence in No. 25566 was by agreement of counsel duly stipulated into the record in said proceeding, and had heard the parties by counsel in argument, the Commision issued a report and order therein, dated May 9, 1933, but not made public or served upon respondents therein or on the State of Ohio until May 17, 1933, being the same report and order referred to in paragraph 1 hereof, a copy of which is attached hereto as "Exhibit B." Said order by its terms requires all cariers by railroad, including plaintiff, operating within the State of Ohio, which were made respondents in said proceeding, on June 10, 1933,

"to establish, put in force, and maintain for the transportation of bituminous coal, in carloads, in intrastate commerce within the State of Ohio, rates which shall not be lower than the rates now in force and applicable to the transportation of such traffic within the State of Ohio, plus the surcharge authorized by the findings in Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 179 I. C. C. 215, and 191 I. C. C. 361, on corresponding interstate traffic, except that the said surcharge shall be added to the basic rates prescribed as minima in Intrastate Rates on Bituminous Coal Within the State of Ohio, I. C. C. decided May 2, 1933, so long as such surcharge is maintained on said interstate traffic in accordance with said findings in Fifteen Per Cent case, 1931, supra."

[fol. 379] 17. That said order of May 2, 1933, in No. 25566, and said order of May 9, 1933, in No. 25885, herein complained of, will vitally and adversely affect the interests and rights of plaintiff as follows:

a. Said orders will require producers and consumers of bituminous coal shipped within the State of Ohio, including plaintiff, the State of Ohio, to pay and bear freight

charges at rates higher than the rates now lawfully in effect pursuant to the laws of Ohio, which rates will be unjust, unreasonable and exorbitant and will subject said producers to undue and unreasonable prejudice and disadvantage and will give to producers outside of the State of Ohio an undue and unreasonable preference and advantage, beyond the power of the State of Ohio or the Ohio Commission to correct, although evidence conclusively establishing the fact that said rates were not less than maximum reasonable rates was received by the Commission; that by reason thereof, shipments of coal from mines on plaintiff's lines in intrastate commerce will be reduced greatly in volume and plaintiff's revenues therefrom will be largely diminished, to plaintiff's great and irreparable damage;

b. Said order of May 9, 1933, in No. 25885 will increase rates within the State of Ohio above those now lawfully in effect, pursuant to the laws of Ohio, at the whim and caprice of the carriers in interstate commerce, and without any determination by the Commission that the rates resulting from said increase will be just and reasonable, to the prejudice of shippers of coal in intrastate commerce on the lines of plaintiff and to the damage of plaintiff through the loss of its revenue.

[fol. 380] 18. That plaintiff avers and charges that the State of Ohio is entitled to regulate, through the Ohio Commission and otherwise, rates for the transportation of bituminous coal by railroad within the State of Ohio, including the rates referred to in the orders herein complained of, and that plaintiff has the right to conduct its business so far as it relates to the transportation of coal in Ohio in intrastate commerce in accordance with such regulation and free from unconstitutional and illegal interference with its said intrastate business by defendant the Interstate Commerce Commission or other federal authority.

19. That the said orders of the Commission are unlawful because in making said orders the Commission did not exert the power conferred upon it by law to remove undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the

one hand and interstate or foreign commerce on the other hand, or undue, unreasonable or unjust discrimination against interstate or foreign commerce caused by rates made or imposed by authority of the State of Ohio, but made the order in the exercise of an assumed power to interfere with rates made or imposed by authority of the State of Ohio which were not less than maximum reasonable rates and which did not cause any such advantage, preference, prejudice, or discrimination, for the purpose of maintaining a supposed commercial and competitive relation between said rates and certain interstate rates on bituminous coal to the same destinations in Ohio, in complete disregard of controlling transportation conditions surrounding said rates, and in doing so the Commission misconstrued the law and exceeded its authority to the damage of plaintiff and in violation of its rights under the law.

[fol. 381] 20. Plaintiff further avers and charges that said orders herein complained of are based upon erroneous constructions of the statutes governing the action and power of the Commission, and upon erroneous conclusions of law made by the Commission, and are not supported by the findings of fact made by the Commission, and said findings are not supported by substantial evidence and are contrary to the evidence in the following particulars:

a. The Commission erroneously held in the report in No. 25566 that the burden of justifying the relationship between the rates made or imposed by authority of the State of Ohio and various interstate rates was upon plaintiff and other parties seeking to defend said Ohio rates, and that only the most convincing evidence would meet the said burden, whereas no such burden rests under the law upon plaintiff or others defending the said Ohio rates but, on the contrary, there is a very severe burden upon those attacking rates made or imposed by State authority as unlawful under the provisions of the federal statutes, which burden was not sustained in the proceeding referred to. By reason of said error, every finding and conclusion of the Commission in said proceeding adverse to said Ohio rates is erroneous and of no effect;

b. The Commission failed to make any finding in the report in No. 25566 with respect to the reasonableness of interstate rates to the destinations in Ohio hereinbefore re-

ferred to from points on the Ohio River in the Ohio No. 8 district (which rates are applicable exclusively to ex-river coal originating at mines on the Monongahela, Allegheny and Ohio rivers and moving in interstate commerce), from mines on the Monongahela Railway in northern West Vir-
[fol. 382] ginia and from mines in districts in southern West Virginia, eastern Kentucky, Tennessee, and Virginia, although Ohio coals are in active and severe competition with coals are in active and severe competition with coals shipped therefrom to northeastern Ohio. The failure of the Commission to find and fix reasonable interstate rates from the points referred to, notwithstanding it purported to fix reasonable rates from the Freeport, Pittsburgh, and Connellsville districts and part of the Fairmont districts, constituted a fatal defect in the exercise of the power purported to be exercised by it, in that, without such finding, it could not lawfully interfere with intrastate rates ordered or authorized by the Ohio Commission.

c. The Commission erred in No. 25566 in adopting as a basis for determining whether or not there was a disparity between the interstate rates and the Ohio rates, the rates approved by it as reasonable from the Freeport, Pittsburgh, Connellsville and part of the Fairmont districts, for the reason that the said rates represent but a portion of a group of related groups.

d. The Commission, while it pretended in the report in No. 25566 to make a formal finding that the Ohio rates investigated by it were generally lower, distance considered, than the reasonable interstate rates approved by it, did not, in truth and in fact, make any such finding in said proceeding and could not have made the same, inasmuch as it appears from the report itself that the Commission refused to measure and judge the relationship between said Ohio rates and the interstate rates with reference to distance and service rendered, but judged the same solely with reference to the alleged competitive equilibrium which said rates, prior to the Ohio reductions hereinbefore referred to, had reached as a result of competition among rival carriers
[fol. 383] over a long period of years, and the finding which the Commission actually made was that in view of the fact that said rates were in such alleged competitive equilibrium prior to said reductions and the fact that interstate ship-

pers had made large investments in reliance on said equilibrium and that the production, sale, and shipment of coal would be shifted from districts now enjoying the same to other districts as a result of any change therein, said relationships should not be disturbed except upon the most convincing evidence; and in making said finding the Commission exercised the power to regulate the business of producing and selling bituminous coal and competition therein, as distinguished from the business of transporting the same in interstate commerce, which is beyond the power conferred upon the Commission by law.

e. The Commission erred in No. 25566 in condemning the Ohio intrastate rates to Canton, Massillon and Akron on the theory that they departed from the competitive relationships with interstate rates which had grown up over a long period of years as a result of competition among rival carriers, because the uncontradicted evidence of all parties to the proceeding conclusively showed that said rates were not in any way related to any interstate rates but were and are in what is known in the terminology of railroad rates as "No Man's Land", which means that they do not move up and down automatically in relation with other rates.

f. The Commission erroneously failed and refused, in the reports in Nos. 25566 and 25885, to make any finding with respect to the question whether the Ohio rates investigated by it are per se and intrinsically less than maximum reasonable rates and therefore the cause of the alleged prejudice to interstate commerce, although evidence conclusively establishing the fact that said rates were not less than maximum reasonable rates was received by the Com-[fol. 384] mission in both said cases, and such failure and refusal was a violation of the right of this plaintiff to have a full hearing and a finding on said question before the sovereign power of the State of Ohio was invaded by federal authority and before rates made and imposed by authority of the State were required to be raised by order of the Commission.

g. That the Commission erroneously failed and refused, in the reports in Nos. 25566 and 25885, to make a finding that the Ohio rates investigated by it are per se and intrinsically less than maximum reasonable rates and there-

fore do not cause any prejudice to interstate commerce, although evidence was received by the Commission which, as a matter of law, required such a finding, and such failure and refusal was a violation of the right of plaintiff to have a full hearing before the sovereign power of the State of Ohio was invaded by federal authority and the rates made and imposed by authority of the State required to be raised by order of the Commission.

h. That the Commission erroneously found and concluded in the report in No. 25566 that rates on bituminous coal in the State of Ohio, and all other rates, of right ought to be higher than rates on the same kinds of traffic in the State of Illinois, despite affirmative and uncontradicted proof given by witnesses on both sides of the controversy, that transportation conditions are the same in the two states.

i. That the Commission erred in the report in No. 25566 in that it conceived the issue presented for decision to be the lawfulness of the former Ohio rates in their relation with interstate rates and, with respect to said issue, placed the burden of proof on the parties seeking to justify the reduced Ohio rates, whereas the true issue was with respect to the lawfulness of the reduced Ohio rates and the [fol. 385] burden of proof was heavily upon the parties seeking to establish the fact that said rates were in violation of the federal laws.

j. The Commission failed to make any finding, in the reports in Nos. 25566 and 25885, that the continued application of the Ohio rates investigated by it would impair the income of the carriers from the traffic moving on said rates or that the increases in said rates required by the orders herein complained of would increase the income of said carriers, and could not have made such findings or either of them because of the entire absence of evidence to support the same. The lack of any such finding constitutes a fatal defect and makes the orders of the Commission illegal and of no effect.

k. The Commission, in the reports in Nos. 25566 and 25885, erroneously pretended to make a finding that the State rates under investigation resulted in undue, unreasonable and unjust discrimination against interstate commerce, meaning thereby that said rates would impose a

revenue burden upon interstate commerce in that the traffic moving thereon would not pay its fair share towards the support of the interstate commerce transportation system, whereas there was no warrant for such a finding in that the investigation omitted numerous important rates on bituminous coal and other traffic made and imposed by authority of the State of Ohio, consideration of which would be essential to a finding that Ohio intrastate traffic as a whole was not paying a fair proportion towards the support of the interstate transportation system.

l. The Commission erred in No. 25566 in that it was unduly influenced by the wholly extraneous theory which was not supported by substantial evidence that the effect of the reduced Ohio rates upon the revenues of the carriers must be judged with reference to alleged revenue losses resulting from the spread of the Ohio intrastate reductions to interstate districts.

[fol. 386] m. The Commission erroneously required by its order in No. 25566 as follows:

"that to the specific rates, or the rates resulting from the bases of rates, found in the said report to be minima for intrastate application as aforesaid, should be added the emergency rates or charges authorized in the Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 179 I. C. C. 215; 191 I. C. C. 361; provided, the emergency rates or charges so authorized have been or are contemporaneously added to the interstate rates from Pennsylvania and West Virginia districts to the same destinations."

inasmuch as there was no evidence or finding with respect to the reasonableness of said emergency charges on interstate traffic and no evidence or finding with respect to the revenue effect of failing to add said charges to the Ohio rates under consideration. The reason for the absence of any such evidence or finding is that at the time the evidence in said No. 25566 was taken said emergency charges were in effect on both interstate and Ohio intrastate traffic and there was no issue in said proceeding with respect to the relation between interstate and Ohio rates after the expiration of said emergency charges on Ohio traffic on March 31, 1933.

n. The orders complained of herein are not supported by substantial evidence.

21. Plaintiff further avers and charges that it is apparent upon a reading of the reports of the Commission herein complained of that the motivating cause for the entry of the orders herein complained of was not the condemnation of undue preference and unjust discrimination against interstate shippers and commerce caused by rates made or imposed by authority of the State of Ohio, but was the desire to preserve intact a supposed competitive rate adjustment which ignores distance and service and rests upon the managerial policy of the competing carriers, other than plaintiff, to make rates on an arbitrary and artificial basis which will divide the available coal traffic among them on a basis satisfactory to them. It is respect-[fol. 387] fully submitted that the Commission exceeded its lawful authority and the constitutional authority of Congress in condemning the reduced Ohio rates upon that ground, and it is further submitted that inasmuch as the motivating cause for the Commission's action clearly appears the effect thereof cannot be avoided by the Commission by the use of language in its reports and orders which would be proper in a report and order based upon lawful grounds, and that this Court will look to the substance and not to the form of said reports and orders and judge the same upon the basis of what the Commission in fact did as distinguished from what it purported to do.

22. Plaintiff further avers that the effect of the orders herein complained of, the purported findings of the Commission to the contrary notwithstanding, will be to cause an undue and unreasonable preference and advantage in favor of interstate shippers, localities and commerce, and an undue and unreasonable prejudice and disadvantage and unjust discrimination against Ohio shippers, localities, and commerce, by reason of the failure and refusal of the Commission to pass upon the reasonableness of numerous and important rates on interstate traffic in bituminous coal, including particularly the rates from points in the State of Ohio on the Ohio River and the rates from districts in southern West Virginia, eastern Kentucky, Tennessee, and Virginia, and that the rate relations required by said orders to be maintained will be unduly preferential and preju-

dicial, unjustly discriminatory, and unlawful, in violation of the Interstate Commerce Act, beyond the power of the Interstate Commerce Commission to require, and beyond the sovereign power of the State of Ohio, to remedy.

[fol. 388] 23. Plaintiff further avers that it has invested large sums of money in building and developing its lines to serve coal mines in the Ohio No. 8, Middle-Coshocton and Massillon districts; that the coal produced from said mines is largely shipped in intrastate commerce to destinations to which the orders of the Commission herein complained of, relate; that if said orders are permitted to become effective, the production from said mines and the shipments therefrom over plaintiff's lines will be greatly diminished; that plaintiff's revenues will thereby be greatly impaired; that the ability of manufacturers in northeastern Ohio who are large consumers of said coal, to compete with other manufacturers in other localities, will be greatly impaired to the further grievous detriment of plaintiff's revenues; that thereby the value of plaintiff's investment in its lines will be in large part destroyed and that unless the enforcement of said orders is by this Honorable Court enjoined, plaintiff will be irreparably damaged and deprived of its property without due process of law.

24. Plaintiff further says that if the orders herein complained of were permitted to take effect, even temporarily, pending final adjudication thereof as to their lawfulness, it will be without means of reparation for the loss to which it would thereby be unlawfully subjected, since the greatly increased rates which would thereby come into effect would destroy a great part of its business and reduce its revenues.

25. Plaintiff is without adequate remedy at law.

26. Wherefore, plaintiff prays:

(1) That upon the filing of this bill the judge of this Court call to his assistance two other judges, one of whom shall be a circuit judge;

(2) That upon five days' notice of the time and place of hearing having been given to the Attorney General and the Interstate Commerce Commission, plaintiff be granted an interlocutory injunction restraining the United States and the Interstate Commerce Commission from enforcing the

terms of the orders herein complained of, pending final decree;

[fol. 389] (3) That in view of the fact that said orders require the Ohio rates to be increased on or before June 10, 1933, pending the consideration of this application for an interlocutory injunction, a restraining order be entered to the same effect as the interlocutory injunction prayed for;

(4) That upon final hearing of this cause a decree be entered adjudging each of said orders to be in all respects unlawful and of no effect and ordering each of the same to be abrogated, cancelled and set aside, and permanently enjoining the United States and the Interstate Commerce Commission, their several officers, agents, attorneys, servants and all persons acting in their behalf, from taking any steps to enforce either of said orders; and

(5) That plaintiff be given such other, further and general relief, as in equity and good conscience may seem meet.

Ernest C. Dempsey, Clan Crawford, John A. Duncan, Solicitors for Plaintiff.

Duly sworn to by George Durham. Jurat omitted in printing.

[fols. 390-488] Exhibits "A" to "G" to petition omitted in printing as these exhibits are the same as Exhibits "A" to "G" to petition in cause No. 1039.

[fol. 489] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 1040

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed June 3, 1933

United States of America, one of the defendants in the above-entitled proceeding, for answer to the petition filed therein against it answers and says:

I

United States admits that the allegations contained in the opening paragraph and paragraphs (1) to (11), both inclusive, of the petition are true, with these exceptions: (a) it denies knowledge of the allegation contained in the last sentence of said paragraph (1); (b) it disclaims knowledge as to whether the Ohio Commission "prescribed maximum reasonable rates on bituminous coal" in its two decisions, as alleged and described in said paragraphs (6) and (7), and respectfully refers the Court to said Exhibits "C" and "D" for full and accurate information concerning the findings of that Commission; and (c) United States denies that anything done or alleged to have been done by said Ohio Commission has any effect upon the validity of the orders of the Interstate Commerce Commission which are attacked by this proceeding.

[fol. 490]

II

Answering paragraph (12) of the petition, United States alleges that the allegations thereof are purely argumentative, and attempt to raise questions of fact which are incompetent, irrelevant and immaterial to any issue raised in this suit, and which this Court is without power to decide.

III

United States admits that the allegations contained in paragraphs (13) and (14) are true, but denies that the facts therein alleged have any relevancy to the validity of the orders of the Interstate Commerce Commission attacked by this suit.

IV

United States admits that the allegations made and contained in paragraphs (15) and (16) of the petition are true, but for full, complete and accurate statement of the matters, things and conclusions set forth in said reports of the Interstate Commerce Commission the Court is respectfully referred to the full and complete text of said reports, copies of which are attached as Exhibits "A" and "B" to the petition.

V

United States denies the allegations contained in paragraph (17) of the petition.

VI

United States admits the allegations contained in paragraph (18) of the petition, but denies that the alleged power of the State of Ohio over transportation rates within that [fol. 491] state is superior to a proper and lawful exercise by the Interstate Commerce Commission of powers expressly granted it under the Interstate Commerce Act.

VII

United States denies the allegations made and contained in paragraph (19) and in paragraph (20), and the separate subdivisions thereof, and paragraphs (21), (22), (23) and (24) of the petition, and particularly denies that said orders of the Interstate Commerce Commission will result in irreparable or other legal damage to the plaintiff, or deprivation of its property without due process of law.

VIII

Answering paragraph (25), United States says that it is without knowledge whether plaintiff has an adequate remedy at law, but admits that a suit to enjoin, annul or set aside the orders of the Interstate Commerce Commission may be brought only by invoking the jurisdiction of the special court of three judges provided for by Urgent Deficiencies Act (38 Stat. 219; U. S. C. Tit. 28, § 41 (28); §§ 43-47, inclusive).

IX

Except as herein expressly admitted, United States denies each and every allegation made and contained in the petition, and each of the several paragraphs thereof.

Wherefore, having fully answered the petition, United States prays that the relief therein prayed be denied and the petition dismissed with costs to the petitioners, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General. Haveth E. Mau, United States Attorney.

[fol. 492] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

[fol. 493] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1040

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed June 3, 1933

The Interstate Commerce Commission, hereinafter called the Commission, defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraph 1 of the petition, the Commission admits for the purposes of this suit the allegations that plaintiff is a railroad corporation organized and existing under the laws of the State of Ohio, and that it operates lines of steam railway in said state in interstate and intrastate commerce, and that it is largely engaged in hauling bituminous coal in intrastate commerce as a common carrier from mines [fol. 494] located on its lines in what are known as the Ohio No. 8, Middle-Coshocton and Massillon districts in eastern Ohio, over its lines or partly over its lines and partly over the lines of connecting carriers to destinations including Canton, Massillon, Akron, Huron, Lorain, and Cleveland and intermediate points in the State of Ohio.

II

Answering paragraph 2 of the petition, the Commission admits and alleges that in a consolidated proceeding then pending before it, entitled Intrastate Rates on Bituminous Coal within the State of Ohio, it made and issued the report and order dated May 2, 1933, a copy of which is attached to the petition marked "Exhibit A"; that said proceeding embraced No. 25566, an investigation instituted by the Com-

mission upon its own motion, following the filing of petitions by twelve railroad common carriers, not including plaintiff herein, engaged in interstate commerce (and, except in four instances, also engaged in intrastate commerce within the State of Ohio) and therefore subject to the provisions of the Interstate Commerce Act and to the jurisdiction of the Commission, to determine whether the existing rates on bituminous coal, in carloads, from Ohio No. 8, Middle, Massillon, Cambridge, Crooksville, Hocking, and Pomeroy districts in Ohio in intrastate commerce, to destinations in northeastern Ohio, including Canton, Massillon, Mansfield, Cleveland, Lorain, Huron, Akron, Orrville, Rocky River, and intermediate points, required, authorized or permitted to be maintained by the Public Utilities Commission of Ohio, caused or would cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and also to determine what rates and charges, if any, or what maximum or minimum or maximum and minimum should be prescribed to be charged by said railroads between said origins and destinations for such trans-
[fol. 495] portation in order to remove such advantage, preference, prejudice, or discrimination, if any, as might be found to exist; that all railroads subject to the Commission's jurisdiction operating within the State of Ohio were made respondents to said proceeding; that after the institution of said investigation four formal complaints relating to the same subject matter were filed with the Commission, namely, No. 25590, Western Pennsylvania Coal Traffic Bureau et al. v. Akron, Canton & Youngstown Railway Company et al.; No. 25656, H. W. Showalter, Receiver, Continental Coal Company et al. v. Akron, Canton & Youngstown Railway Company et al.; No. 25657, Property Owners' Committee et al. v. Akron, Canton & Youngstown Railway Company et al.; and No. 25670, Robert C. Hill, Frank R. Lyon and Howell Fisher, Domiciliary Receivers of the Consolidation Coal Company et al. v. Akron, Canton & Youngstown Railway Company et al.; that said formal complaints alleged, among other things, that the relation between the aforesaid Ohio intrastate rates on bituminous coal, on the one hand, and the interstate rates on bituminous coal from

various mining districts in Pennsylvania, West Virginia, Virginia, and Kentucky to the same Ohio destinations, on the other hand, resulted in undue preference of persons and localities in Ohio and undue prejudice against complainants, in violation of sections 3 and 13 of the Interstate Commerce Act; that said formal complaint cases were consolidated for hearing with No. 25566 and were heard jointly with that case, and there were also heard and considered with the above-mentioned cases two investigation and suspension cases, namely, Investigation and Suspension Dockets Nos. 3801 and 3833, both entitled Coal from Pennsylvania to Northern Ohio, and all of said cases were decided and disposed of together in and by said report and order of May 2, 1933 (except that one matter in issue in Nos. 25656 and 25670 was reserved for further consideration by the Commission, and for this reason these two cases were left open on the Commission's docket for future disposition of that issue).

[fol. 496] The Commission respectfully refers the Court to the text of said report and order (Exhibit A to petition) for full, complete, and accurate information concerning the contents thereof.

Further answering paragraph 1 of the petition, the Commission admits and alleges that in a proceeding then pending before it, entitled No. 25885, Surcharge on Bituminous Coal within the State of Ohio, it made and issued the report and order dated May 9, 1933, a copy of which is attached to the petition marked "Exhibit B"; that said proceeding was an investigation instituted by the Commission upon its own motion, following the filing of a petition by The Public Service Commission of the Commonwealth of Pennsylvania, to determine whether, through refusal of the Public Utilities Commission of Ohio to permit increases in freight rates on bituminous coal on and after April 1, 1933, for intrastate traffic within the State of Ohio corresponding to those which were approved for interstate traffic in Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 179 I. C. C. 215, 191 I. C. C. 361, such intrastate rates caused or would cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce, on the other hand, or any unjust discrimination against interstate or foreign commerce, and also to determine what rates and

charges, if any, or what maximum or minimum or maximum and minimum should be prescribed to be charged by the carriers, in order to remove such advantage, preference, prejudice or discrimination, if any, as might be found to exist; that all railroads subject to the Commission's jurisdiction operating within the State of Ohio were made respondents to said proceeding; that after a full hearing in said investigation, the Commission issued its report and order as aforesaid.

[fol. 497] The Commission respectfully refers the Court to the text of said report and order (Exhibit B to petition) for full, complete and accurate information concerning the contents thereof. The Commission also respectfully refers the Court to the reports in Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 179 I. C. C. 215, 191 I. C. C. 361, and Increases in Intrastate Freight Rates, 186 I. C. C. 615, copies of which reports are attached hereto, marked Exhibits 1, 2, 3 and 4, respectively, and made a part hereof.

III

Answering paragraphs 3 and 4 of the petition, the Commission admits for the purposes of this suif that the allegations contained in said paragraphs are true.

IV

Answering paragraph 5 of the petition, the Commission denies that the State of Ohio possesses power to regulate the rates of interstate carriers for transportation of property between points in the State in such manner as to cause undue preference of Ohio shippers and localities, undue prejudice against interstate localities and shippers, or unjust discrimination against interstate commerce.

V

Answering paragraphs 6 to 11, both inclusive, of the petition, the Commission admits for the purposes of this suit that the Public Utilities Commission of Ohio took the action therein described.

VI

Answering paragraph 12 of the petition, the Commission

denies the truth of each of and all the allegations contained therein.

VII

Answering paragraphs 13 and 14 of the petition, the Commission admits for the purposes of this suit that the Public Utilities Commission of Ohio took the action therein described.

VIII

Answering paragraph 15 of the petition, the Commission admits and alleges that by order of October 3, 1932, first supplemental order of October 28, 1932, and second supple-
[fol. 498] mental order of December 7, 1932, it instituted, upon its own motion, the proceeding entitled No. 25566, Intrastate Rates on Bituminous Coal within the State of Ohio; that in said proceeding, consolidated as aforesaid with the four formal complaint cases, a full hearing was had; that at said hearing, and in all proceedings in connection therewith, The Wheeling & Lake Erie Railway Company, plaintiff herein, was represented by its attorneys who took an active part in the development of the record therein; that at said hearing the Commission accorded to all parties to said consolidated proceeding, including The Wheeling & Lake Erie Railway Company, plaintiff herein, full and fair opportunity to be heard upon all matters involved in said proceeding; that at said hearing a large volume of testimony and other evidence bearing upon said matters was submitted to the Commission for consideration on behalf of said parties, including The Wheeling & Lake Erie Railway Company, plaintiff herein, by their respective counsel; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and entered and served upon the parties to said proceeding its said report and order of May 2, 1933, which said report and order included the Commission's findings of fact, decisions, conclusions, orders, and requirements in the premises; and that, upon the evidence aforesaid and as shown in and by said report, the Commission made the findings and stated the conclusions upon which said order is based.

The Commission further alleges that the findings and conclusions in said report of May 2, 1933, were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the Commission in said proceeding as aforesaid, and the Commission denies each of and all the allegations to the contrary contained in the petition.

[fol. 499] Further answering paragraph 15 of the petition, the Commission denies that said paragraph sets forth fully and correctly the requirements, terms, conditions, and authorizations contained in said order of May 2, 1933, and the Commission respectfully refers the Court to the order itself for full, complete, and accurate information as to the contents thereof.

IX

Answering paragraph 16 of the petition, the Commission admits and alleges that by order of March 29, 1933, it instituted, upon its own motion, the proceeding entitled No. 25885, Surcharge on Bituminous Coal within the State of Ohio; that is said proceeding a full hearing was had; that at said hearing, and in all proceedings in connection therewith, The Wheeling & Lake Erie Railway Company, plaintiff herein, was represented by its attorneys who took an active part in the development of the record therein; that at said hearing the Commission accorded to all parties to said proceeding, including The Wheeling & Lake Erie Railway Company, plaintiff herein, full and fair opportunity to be heard upon all matters involved in said proceeding; that at said hearing a large volume of testimony and other evidence bearing upon said matters, including the evidence in No. 25566, was submitted to the Commission for consideration on behalf of said parties, including The Wheeling & Lake Erie Railway Company, plaintiff herein, by their respective counsel; that at said hearing questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and entered and served upon the parties to said proceeding its report and order of May 9, 1933, which said report and order included the Commission's findings of fact, decisions, conclusions, orders and requirements in the premises; and that, upon the evidence

aforesaid and as shown in and by said report, the Commission made the findings and stated the conclusions upon which said order is based.

[fol. 500] The Commission further alleges that the findings and conclusions in said report of May 9, 1933, were and are, and that each of them was and is, fully supported and justified by the evidence submitted to the Commission in said proceeding as aforesaid, and the Commission denies each of and all the allegations to the contrary contained in the petition.

Further answering paragraph 16 of the petition, the Commission denies that said paragraph sets forth fully and correctly the requirements, terms, conditions, and authorizations contained in said order of May 9, 1933, and the Commission respectfully refers the Court to the order itself for full, complete, and accurate information as to the contents thereof.

X

Answering paragraphs 17 and 18 of the petition, the Commission admits and alleges that certain of the present Ohio intrastate rates on bituminous coal required to be maintained by certain orders of the Public Utilities Commission of Ohio, were found by the Commission in said reports and orders of May 2, 1933, and May 9, 1933, to cause undue preference of Ohio shippers and localities, undue prejudice against interstate localities and shippers, and undue, unreasonable, and unjust discrimination against interstate commerce, and, therefore, under the provisions of section 13 (4) of the Interstate Commerce Act, the rates prescribed by the Commission in said orders to remove said preference, prejudice, and discrimination are required to be maintained, the law of any State or the decision or order of any State authority to the contrary notwithstanding. Further answering said paragraphs, the Commission admits and alleges that said orders of May 2, 1933, and May 9, 1933, will require certain shipments of bituminous coal within the State of Ohio to pay freight charges at rates higher than those now in effect but denies that the present rates are lawful rates for the following reasons:

[fol. 501] (1) That in making its orders of May 2, 1933, and May 9, 1933, the Commission acted under the authority

conferred upon it by paragraphs (3) and (4) of section 13 of the Interstate Commerce Act; (2) that in requiring by said orders increases in the Ohio intrastate rates of the various railroads respondents in the Commission proceeding, all of which are common carriers engaged in interstate commerce (as well as in intrastate commerce) and therefore subject to the provisions of the Interstate Commerce Act and to the jurisdiction of the Commission, for the purpose of removing undue preference of Ohio shippers and localities, undue prejudice against interstate shippers and localities, and undue, unreasonable, and unjust discrimination against interstate commerce, found by the Commission after full hearing to exist, the Commission did not require increases in a lawful scale of rates, but, on the contrary, required increases in a scale of intrastate rates found by the Commission to be unlawful, in that said scale of rates caused undue preference and undue prejudice as between persons and localities in intrastate commerce on the one hand, and interstate commerce, on the other hand, and undue, unreasonable, and unjust discrimination against interstate commerce, which is forbidden and declared to be unlawful by section 13 (4) of the Interstate Commerce Act.

XI

Answering paragraph 19 of the petition, the Commission denies the truth of each of and all the allegations contained therein.

XII

Answering paragraph 20 of the petition, the Commission denies that said orders of May 2, 1933, and May 9, 1933, are based upon erroneous constructions of the statutes governing the action and power of the Commission, denies that said orders are based upon erroneous conclusions of law made by the Commission, denies that said orders are not supported by the findings of fact made by the Commission, de-
[fol. 502] nies that said findings are not supported by substantial evidence, denies that they are contrary to the evidence in the particulars alleged or in any other respect, and denies that said orders are either unlawful or invalid for the reasons or for any of the reasons set forth in said paragraphs.

XIII

Answering paragraphs 21 and 22 of the petition, the Commission denies the truth of each of and all the allegations contained therein.

XIV

Answering paragraph 23 of the petition, and further answering paragraphs 18 and 19 of the petition, the Commission denies that the increased charges which it prescribed in its said orders of May 2, 1933, and May 9, 1933, will subject plaintiff to irreparable damage or to any other legal injury, denies that plaintiff will be deprived of its property without due process of law, and denies that said orders are illegal or unconstitutional in any respect whatsoever.

XV

Answering paragraph 24 of the petition, the Commission denies the truth of each of and all the allegations contained therein.

XVI

Further answering paragraphs 15 to 24 of the petition, the Commission alleges that in making its said reports and orders of May 2, 1933, and May 9, 1933, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including all matters covered by the material allegations of the petition herein.

The Commission further alleges that said orders of May 2, 1933, and May 9, 1933, were not made or entered either [fol. 503] arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said orders the Commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the Commission denies each of and all the allegations to the contrary contained in the petition.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition in so far as they conflict either with the allegations herein or with either the statements or conclu-

sions of fact included in said reports and orders of May 2, 1933, and May 9, 1933, which said reports and orders are hereby referred to and made a part of this answer.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that the petition herein be dismissed.

Interstate Commerce Commission, by J. Stanley Payne, Assistant Chief Counsel. Daniel W. Knowlton, Chief Counsel, of Counsel.

[fols. 504-663] *Duly sworn to by Frank McManamy. Jurat omitted in printing.*

Exhibits 1 to 4 to answer of I. C. C. omitted in printing as these exhibits are the same as Exhibits 1 to 4 to answer of I. C. C. in Cause No. 1039.

[fols. 664 & 665] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Equity. No. 1040

[Title omitted]

MOTION OF EASTERN OHIO COAL OPERATORS' ASSOCIATION, ET AL., FOR LEAVE TO INTERVENE—Filed June 3, 1933

Now come Eastern Ohio Coal Operators' Association, Akron Coal Company, Big Five Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal and Dock Company, Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company, Wheeling Township Coal Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company, B. F. Goodrich Company, Republic Steel Corporation, Otis Steel Company and C. H. Henkel, Receiver, Empire Steel Corporation, by E. S. Ballard, their

solicitor, and move the court for leave to intervene herein on the part of the plaintiff and tender herein their petition to which reference is made for the grounds of this motion.

E. S. Ballard, Solicitor for the above named Petitioners, 120 South LaSalle Street, Chicago, Illinois.

[fol. 666] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Equity. No. 1040

[Title omitted]

PETITION OF INTERVENTION OF EASTERN OHIO COAL OPERATORS' ASSOCIATION, AKRON COAL COMPANY, BIG FIVE COAL COMPANY, CAMBRIDGE COLLIERIES COMPANY, CLARKSON COAL MINING COMPANY, HANNA COAL COMPANY, LORAIN COAL AND DOCK COMPANY, OHIO AND PENNSYLVANIA COAL COMPANY, UNITED STATES COAL COMPANY, WARNER COLLIERIES COMPANY, WHEELING TOWNSHIP COAL MINING COMPANY, YOUGHIOGHENY & OHIO COAL COMPANY, CLEVELAND CHAMBER OF COMMERCE, AKRON CHAMBER OF COMMERCE, GOODYEAR TIRE AND RUBBER COMPANY, FIRESTONE TIRE AND RUBBER COMPANY, B. F. GOODRICH COMPANY, REPUBLIC STEEL CORPORATION, OTIS STEEL COMPANY, AND C. H. HENKEL, Receiver, EMPIRE STEEL CORPORATION—Filed Jan. 6, 1934

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

Now come your petitioners, Eastern Ohio Coal Operators' Association, Akron Coal Company, Big Five Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal and Dock Company; Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company, Wheeling Township Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company, B. F.

Goodrich Company, Republic Steel Corporation, Otis Steel Company and C. H. Henkel, Receiver, Empire Steel Corporation, and respectfully represent to this Honorable Court that they have an interest in the matters involved in this suit, and desire to intervene and be made parties plaintiff to said suit, and say:

1. That under the provisions of the Act of Congress of October 22, 1913, c. 32, 38 Stat. 220; Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 938, relating to suits to suspend or set aside [fol. 667] any order of the Interstate Commerce Commission, it is provided that:

"The procedure in district courts * * * in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title * * *."

Section 45a above referred to relating to procedure in cases involving the validity of orders of the Interstate Commerce Commission, contains the following proviso:

"Provided, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their own counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits."

2. That your petitioners, except Eastern Ohio Coal Operators' Association, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company and B. F. Goodrich Company, are, and at all times hereinafter mentioned have been corporations organized and existing under the laws of the State of Ohio and other States of the United States, owning and/or operating coal mines in the Ohio No. 8 and Cambridge districts in eastern Ohio; that your

petitioner Eastern Ohio Coal Operators' Association is a voluntary association of operators producing bituminous coal in the Pittsburgh vein of Ohio, with its principal office in Cleveland, Ohio, and that one of the objects of this association is to protect and promote in all lawful ways the transportation rights and interests of its members; that your petitioner, The Cleveland Chamber of Commerce, is a non-profit corporation, one of the objects of which is to promote and protect in all lawful ways the transportation rights and interests of its members, some of whom are large consumers of coal shipped from the Ohio Number 8 and [fol. 668] Cambridge Districts to Cleveland, Ohio; that your petitioner Akron Chamber of Commerce is a voluntary association of the manufacturing and mercantile establishments of Akron, Ohio, one of the objects of which is to protect and promote in all lawful ways the transportation rights and interests of its members some of whom are large consumers of coal shipped from the Ohio No. 8 and Cambridge districts to Akron, Ohio; that your petitioners Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company and B. F. Goodrich Company are corporations organized and existing under and by virtue of the laws of the State of Ohio and are engaged in the manufacture of rubber tires and other rubber articles and consume large quantities of bituminous coal shipped from the Ohio No. 8 and Cambridge districts to Akron, Ohio; that petitioners Republic Steel Corporation, Otis Steel Company and C. H. Henkel, Receiver, Empire Steel Corporation, are corporations organized and existing under and by virtue of the laws of the State of Ohio and are engaged in the manufacture of iron and steel articles at various points in northeastern Ohio, including Canton, Massillon and Cleveland and consume large quantities of bituminous coal shipped from Ohio No. 8 district to Canton, Massillon and Cleveland, Ohio.

3. That your petitioners were parties in interest to the proceeding before the Interstate Commerce Commission entitled Intrastate Rates on Bituminous Coal Within the State of Ohio, No. 25566, in which the report and order bearing date May 2, 1933, herein complained of, were made, and to the proceeding before the Interstate Commerce Commission entitled Surcharge on Bituminous Coal Within

the State of Ohio, No. 25885, in which the report and order bearing date May 9, 1933, herein complained of, were made.

4. That in said proceeding before said Interstate Commerce Commission your petitioners introduced evidence and, by their attorneys, produced, examined and cross-examined witnesses, and were heard in argument and upon brief in all the matters involved in said proceeding; that your petitioners have an interest in the matters in litiga-
[fol. 669] tion in the above entitled cause; that unless the orders of the Commission above referred to are vacated and set aside your petitioners will suffer great and irreparable damage and injury the amount of which cannot be definitely ascertained; and that your petitioners seek and demand the same relief as that which is sought by plaintiff in this case.

In support of this petition of intervention, your petitioners herein incorporate and make a part of this petition the following paragraphs contained in the bill of complaint filed by the plaintiff herein, to wit: Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 and ask that the said paragraphs and each and every one of them be deemed a part of this petition, the same as if they were set out in full.

Wherefore, your petitioners pray for an order granting leave to intervene and making them parties plaintiff herein in all respects with the same rights and privileges as if your petitioners had filed the original bill of complaint; and that your petitioners may have such other and further relief in the premises as equity may require and as to your Honors may seem meet.

Eastern Ohio Coal Operators' Association, Akron Coal Company, Big Five Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal and Dock Company, Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company, Wheeling Township Coal Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company, B. F. Goodrich Company, Republic Steel Corporation,

Otis Steel Company, C. H. Henkel, Receiver, Empire Steel Corporation, by E. S. Ballard, Solicitor for above named Petitioners, 120 S. LaSalle St., Chicago, Illinois.

[fols. 670 & 671] *Duly sworn to by D. F. Hurd. Jurat omitted in printing.*

[fols. 672 & 673] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Equity No. 1040

[Title omitted]

ORDER ALLOWING INTERVENTION—Filed Jan. 6, 1934

This cause coming on to be heard upon the motion of Eastern Ohio Coal Operators' Association, Akron Coal Company, Big Five Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal and Dock Company, Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company, Wheeling Township Coal Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company, B. F. Goodrich Company, Republic Steel Corporation, Otis Steel Company and C. H. Henkel, Receiver, Empire Steel Corporation for leave to intervene herein as parties plaintiff, and the court being fully advised in the premises,

It is hereby ordered, adjudged and decreed, that the above named petitioners have leave, and leave is hereby granted to them, to intervene in this suit for their own interests and the interests of those whom they represent, as parties plaintiff herein, with the same rights and privileges as if they had filed the original bill of complaint.

Enter.

Hough, Judge.

[fols. 674 & 675] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Equity No. 1040

[Title omitted]

MOTION OF THE BOARD OF COUNTY COMMISSIONERS OF BELMONT COUNTY, OHIO, ET AL. FOR LEAVE TO INTERVENE—Filed June 3, 1933.

Now come the Board of County Commissioners of Belmont County, Ohio, Burn Ohio Coal Association, The Second National Bank of St. Clairsville, Ohio, St. Clairsville Rotary Club, The Steubenville Clearing House Association, The Cambria Collieries Company, Fisher Body Company, Jaite Company, The Colonial Insulator Company, The United States Stoneware Company, The Klages Coal & Ice Company, The Mansfield Chamber of Commerce, Geogele Bros., The Hanley Milling Company, The Barnes Manufacturing Company, The Hinde & Daugh Paper Company, The Cleveland & Sandusky Brewing Company, The Wagner Quarries Company, George A. Matthes Coal & Supply Company, The Waldock Packing Company, The Sandusky Chamber of Commerce, The Sandusky Packing Company, The Western Reserve Rubber Company, Medusa Portland Cement Company, M. L. Branyan & Bro. and Kallmerten & Baer, Inc. by E. S. Ballard, their solicitor, and move the court for leave to intervene herein on the part of the plaintiff and tender herein their petition to which reference is made for the grounds of this motion.

E. S. Ballard, Solicitor for above named Petitioners,
120 South LaSalle Street, Chicago, Ill.

[fol. 676] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Equity No. 1040

[Title omitted]

PETITION OF INTERVENTION OF BOARD OF COUNTY COMMISSIONERS OF BELMONT COUNTY, OHIO, BURN OHIO COAL ASSOCIATION, THE SECOND NATIONAL BANK OF ST. CLAIRSVILLE,

OHIO, ST. CLAIRSVILLE ROTARY CLUB, THE STEUBENVILLE CLEARING HOUSE ASSOCIATION, THE CAMBRIA COLLIERIES COMPANY, FISHER BODY COMPANY, JAITE COMPANY, THE COLONIAL INSULATOR COMPANY, THE UNITED STATES STONEWARE COMPANY, THE KLAGES COAL & ICE COMPANY, THE MANSFIELD CHAMBER OF COMMERCE, GOEGELE BROS., THE HANLEY MILLING COMPANY, THE BARNES MANUFACTURING COMPANY, THE HINDE & DAUGH PAPER COMPANY, THE CLEVELAND & SANDUSKY BREWING COMPANY, THE WAGNER QUARRIES COMPANY, GEORGE A. MATTHES COAL & SUPPLY COMPANY, THE WALDOCK PACKING COMPANY, THE SANDUSKY CHAMBER OF COMMERCE, THE SANDUSKY PACKING COMPANY, THE WESTERN RESERVE RUBBER COMPANY, MEDUSA PORTLAND CEMENT COMPANY, M. L. BRANYAN & BRO., AND KALLMERTEN & BAER, INC—Filed Jan. 6, 1934

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division.

Now come your petitioners Board of County Commissioners of Belmont County, Ohio, Burn Ohio Coal Association, The Second National Bank of St. Clairsville, Ohio, St. Clairsville Rotary Club, The Steubenville Clearing House Association, The Cambria Collieries Company, Fisher Body Company, Jaite Company, The Colonial Insulator Company, The United States Stoneware Company, The Klages Coal & Ice Company, The Mansfield Chamber of Commerce, Voegele Bros., The Hanley Milling Company, The Barnes Manufacturing Company, The Hinde & Daugh Paper Company, The Cleveland & Sandusky Brewing Company, The Wagner Quarries Company, George A. Matthes Coal & Supply Company, The Waldock Packing Company, The Sandusky Chamber of Commerce, The Sandusky Packing Company, The Western Reserve Rubber Company, Medusa Portland Cement Company, M. L. Branyan & Bro. and Kallmerten & Baer, Inc., and respectfully represent to this Honorable Court that they have an interest in the matters in- [fol. 677] volved in this suit, and desire to intervene and be made parties plaintiff to said suit, and say:

I. That under the provisions of the Act of Congress of October 22, 1913; c. 32, 38 Stat. 220; Feb. 13, 1925, c. 229, sec. 1, 43 Stat. 938, relating to suits to suspend or set aside any

order of the Interstate Commerce Commission, it is provided that:

"The procedure in district courts * * * in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title * * *."

Section 45a above referred to relating to procedure in cases involving the validity of orders of the Interstate Commerce Commission, contains the following proviso:

"Provided further, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein."

2. That your petitioners are communities, associations, corporations, firms and individuals doing business in the State of Ohio and having offices in said state and that they or those whom they represent are dealers in and/or consumers of and/or producers of bituminous coal mined and transported by railroad in intrastate commerce within the State of Ohio.

3. That your petitioners are interested in the controversy or question before the Interstate Commerce Commission in Intrastate Rates on Bituminous Coal Within the State of Ohio, No. 25566, in which the report and order bearing date [fol. 678] May 2, 1933, herein complained of, were made; that your petitioners are interested in the controversy or question before the Interstate Commerce Commission in Surcharges on Bituminous Coal Within the State of Ohio, No. 25885, in which the report and order bearing date May

9, 1933, herein complained of, were made; and that your petitioners have an interest in the matters involved in this suit.

4. That unless the orders above referred to are vacated and set aside your petitioners will suffer great and irreparable damage and injury, the amount of which cannot be definitely ascertained; and that your petitioners seek and demand the same relief as that which is sought by the plaintiff in this case.

In support of this petition of intervention, your petitioners herein incorporate and make a part of this petition the following paragraphs contained in the bill of complaint filed by the plaintiff herein, to wit: Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 29, 21, 22, 23, 24 and 25 and ask that the said paragraphs and each and every one of them be deemed a part of this petition, the same as if they were set out in full.

Wherefore, your petitioners pray for an order granting leave to intervene and making them parties plaintiff herein in all respects with the same rights and privileges as if your petitioners had filed the original bill of complaint; and that your petitioners may have such other and further relief in the premises as equity may require and as to your Honors may seem meet.

Board of County Commissioners of Belmont County, Burn Ohio Coal Association, The Second National Bank of St. Clairsville, Ohio, St. Clairsville Rotary Club, The Steubenville Clearing House Association, The Cambria Collieries Company, Fisher Body Company, Jaite Company, The Colonial Insulator Company, The United States Stoneware Company, The Klages Coal & Ice Company, The Mansfield Chamber of Commerce, Goegele Bros., The Hanley Milling Company, The Barnes Manufacturing Company, The Hinde & Daugh Paper Company, The Cleveland & Sandusky Brewing [fols. 679 & 680] Company, The Wagner Quarries Company, George A. Matthes Coal & Supply Company, The Waldock Packing Company, The Sundusky Chamber of Commerce, The Sandusky Packing Company, The Western Reserve Rubber Com-

pany, Medusa Portland Cement Company, M. L. Branyan & Bro., Kallmerten & Baer, Inc., by E. S. Ballard, Solicitor, for the above named petitioners, 120 South LaSalle St., Chicago, Illinois.

Duly sworn to by D. F. Hurd. Jurat omitted in printing.

[fols. 681 & 682] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Equity. No. 1040

[Title omitted]

ORDER ALLOWING INTERVENTION—Filed Jan. 6, 1934

This cause coming on to be heard upon the motion of the Board of County Commissioners of Belmont County, Ohio, Burn Ohio Coal Association, The Second National Bank of St. Clairsville, Ohio, St. Clairsville Rotary Club, The Steubenville Clearing House Association, The Cambria Collieries Company, Fisher Body Company, Jaite Company, The Colonial Insulator Company, The United States Stoneware Company, The Klages Coal & Ice Company, The Mansfield Chamber of Commerce, Goegele Bros., The Hanley Milling Company, The Barnes Manufacturing Company, The Hinde & Daugh Paper Company, The Cleveland & Sandusky Brewing Company, The Wagner Quarries Company, George A. Matthes Coal & Supply Company, The Waldock Packing Company, The Sandusky Chamber of Commerce, The Sandusky Packing Company, The Western Reserve Rubber Company, Medusa Portland Cement Company, M. L. Branyan & Bro., and Kallmerten & Baer, Inc. for leave to intervene herein as parties plaintiff and the court being fully advised in the premises.

It is hereby ordered, adjudged and decreed that the above named petitioners have leave, and leave is hereby granted to them, to intervene in this suit for their own interests and the interests of those whom they represent as parties plaintiff herein, with the same rights and privileges as if they had filed the original bill of complaint.

Enter:

Hough, Judge. Nevin, J.

[fol. 683] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1040

[Title omitted]

PETITION OF INTERVENTION—Filed Jan. 6, 1934

To the Honorable District Court of the United States for the Southern District of Ohio, Eastern Division:

Come now The Baltimore and Ohio Railroad Company, a corporation under the laws of the State of Maryland, The Chesapeake and Ohio Railway Company, a corporation under the laws of the State of Virginia, Erie Railroad Company, a corporaton under the laws of the State of New York, The Monongahela Railway Company, a corporation under the laws of the Commonwealth of Pennsylvania, The New York Central Railroad Company, a corporation under the laws of the State of Ohio, The New York, Chicago and St. Louis Railroad Company, a corporation under the laws of the State of Ohio, Norfolk & Western Railway Company, a corporation under the laws of the State of Virginia, The Pennsylvania Railroad Company, a corporation under the laws of the Commonwealth of Pennsylvania, Pittsburgh, [fol. 684] Chartiers and Youghiogheny Railway Company, a corporation under the laws of the Commonwealth of Pennsylvania, The Pittsburgh & Lake Erie Railroad Company, a corporation under the laws of the State of Pennsylvania, Western Maryland Railway Company, a Corporation under the laws of the State of Maryland, The Virginian Railway Company, a corporation under the laws of the State of Virginia, and The Pittsburgh & West Virginia Railway Company, a corporation under the laws of the State of Pennsylvania and move the court for leave to intervene in the above-styled cause and to become parties thereto in order to protect their rights involved in such proceeding. Each of said interveners is and for many years has been engaged in operating a railroad within the State of Ohio, extending in itself or in connection with other railroads and systems into other States of the United States, and is and has been a common carrier of freight by railroad within the State of

Ohio, engaged in business as such common carrier of transportation of freight intrastate between points in the State of Ohio, and points in other States, and at all times hereinafter mentioned was a common carrier of freight by railroad subject to the provisions of the Act of Congress known as the "Interstate Commerce Act" and "Transportation Act 1920", and each of said interveners is vitally interested in the subject-matter of this complaint and desires to intervene therein on behalf of the defendants and as such to answer the petition herein and to participate in the trial of said cause as a party defendant.

I

Interveners admit for the purposes of this suit the alle-
[fol. 685] gations that plaintiff is a railroad corporation organized and existing under the laws of the State of Ohio, and that it operates lines of steam railway in said State in inter and intrastate commerce, and that it is largely engaged in hauling bituminous coal in intrastate commerce as a common carrier from mines located on its lines in what are known as the Ohio No. 8, Middle-Coshocton and Massillon Districts in Eastern Ohio, partly over its lines and partly over the lines of connecting carriers to destinations including Canton, Massillon, Akron, Huron, Lorain and Cleveland, and intermediate points in the State of Ohio.

Interveners are without sufficient information to admit or deny the allegations of this paragraph with respect to the extent that the plaintiff hauls coal in interstate commerce and with respect to plaintiff's credit. They deny, however, that the orders of the Interstate Commerce Commission complained of are unlawful in any respect whatsoever.

II

Interveners admit the allegations of paragraph 2 of the petition. They respectfully refer the court to the text of the report and orders of the Interstate Commerce Commission (Exhibits A and B to original petition) for full, complete and accurate information concerning the contents thereof.

III

Interveners admit that the orders herein complained of were not made upon the petition of any party hereto, but

deny that the matter complained of in the petitions before [fol. 686] the Commission in the proceedings in which the said orders were made was limited to the alleged effect upon interstate commerce, and they allege, on the contrary, that said petition complained of the effect upon persons and localities engaged in interstate commerce, as well as upon interstate commerce, of rates prescribed, authorized or permitted by authority of the State of Ohio for the transportation by railroad in intrastate commerce of bituminous coal shipped from mines in the State of Ohio, including mines in the Southern District, Eastern Division, thereof.

IV

Interveners admit the allegations of paragraph 4 of the petition.

V

Interveners admit the allegations contained in paragraph 5 of the petition, subject, however, to the paramount authority of the Interstate Commerce Commission on all questions of unlawful discrimination against interstate commerce and against persons and localities engaged in interstate commerce.

VI

Interveners admit the allegations contained in paragraph 6 of the petition, except to the extent that said allegations describe or characterize the rates referred to as having been prescribed by the Ohio Commission in its Docket No. 7252 as "maximum reasonable rates", and interveners deny that said rates so prescribed by the Ohio Commission are "maximum reasonable rates". Further answering the allegations of this paragraph, interveners say that they are required by the [fol. 687] order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission and, effective June 10, 1933, to thereafter charge, in lieu of the rates prescribed by the Ohio Commission for the transportation of coal between points within the State of Ohio, referred to in said paragraph, rates prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

VII

Interveners admit the allegations contained in paragraph 7 of the petition, except to the extent that said alle-

gations described or characterize the rate referred to as having been prescribed by the Ohio Commission in its Docket No. 7036 as "a maximum reasonable rate", and interveners deny that said rate so prescribed by the Ohio Commission is "a maximum reasonable rate". Further answering the allegations of this paragraph, interveners say that they are required by the order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission and, effective June 10, 1933, to thereafter charge, in lieu of the rate prescribed by the Ohio Commission for the transportation of coal between points within the State of Ohio, referred to in said paragraph, the rate prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

VIII

Interveners admit the allegations contained in paragraph 8 of the petition.

[fol. 688]

IX

Interveners admit the allegations contained in paragraph 9 of the petition. Further answering the allegations of this paragraph, interveners say that the Wheeling & Lake Erie Railway Company, The Lorain & West Virginia Railway Company, and The Akron, Canton & Youngstown Railway Company are required by the order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission and, effective June 10, 1933, to thereafter charge, in lieu of the rates published by them for the transportation of coal between points within the State of Ohio, referred to in said paragraph, rates prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

X

Interveners admit the allegations contained in paragraph 10 of the petition. Further answering the allegations of this paragraph, interveners say that the Pittsburgh & West Virginia Railway Company is required by the order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission, and effective June 10, 1933, to thereafter charge, in lieu of the rates published by

it for the transportation of coal between points within the State of Ohio, referred to in said paragraph, rates prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

[fol. 689]

XI

Interveners admit the allegations contained in paragraph 11 of the petition. Further answering the allegations of this paragraph, the interveners referred to therein say that they are required by the order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission and, effective June 10, 1933, to thereafter charge, in lieu of the rates published by them for the transportation of coal between points within the State of Ohio, referred to in said paragraph, rates prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

XII

Interveners deny the allegations contained in paragraph 12 of the petition.

XIII

Interveners admit the allegations contained in paragraph 13 of the petition. Further answering the allegations of this paragraph, the interveners referred to therein say that they and the Wheeling & Lake Erie Railway Company are required by the order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission and, effective June 10, 1933, to thereafter charge, in lieu of the rates prescribed by the Ohio Commission in its Docket No. 8072 for the transportation of coal between points within the State of Ohio, referred to in said paragraph, rates prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

XIV

Interveners admit the allegations contained in paragraph [fol. 690] 14 of the petition. Further answering the allegations of this paragraph, the intervener referred to therein says that it, together with other carriers joining with it in

through joint rates on coal from its mines in the Pomeroy District, is required by the order of the Interstate Commerce Commission of May 2, 1933, to publish and file with the Ohio Commission and, effective June 10, 1933, to thereafter charge, in lieu of the rates prescribed by the Ohio Commission in its Docket No. 8097 for the transportation of coal between points within the State of Ohio, referred to in said paragraph, rates prescribed by the Interstate Commerce Commission as set forth in Appendix D to its report of May 2, 1933.

XV

Interveners admit the allegations contained in paragraph 15 of the petition, and, further answering, say that said order of the Interstate Commerce Commission of May 2, 1933, is the paramount authority on all questions of unlawful discrimination of intrastate rates against interstate commerce or against persons and localities engaging in interstate commerce and that the interveners are required to comply with the terms of said order, notwithstanding anything in the orders of the Ohio Commission or in the statutes of the State of Ohio to the contrary.

XVI

Interveners admit the allegations contained in paragraph 16 of the petition.

XVII

Interveners admit that the orders of the Interstate Com- [fol. 691] merce Commission of May 2, 1933, in Docket No. 25566 and of May 9, 1933, in Docket No. 25885 will require certain shipments of bituminous coal within the State of Ohio to pay freight charges at rates higher than those now in effect by virtue of mandatory or permissive orders of the Ohio Commission, referred to in the petition herein, but they deny each and every other allegation of said paragraph 17.

Further answering the allegations of this paragraph, interveners ask that reference be made to said orders of the Interstate Commerce Commission and the reports accompanying said orders. Interveners aver that the said orders of the Interstate Commerce Commission were amply supported in every part thereof by substantial evidence and

that the evidence so legally offered and received not only justified but required the findings made in these proceedings by the Interstate Commerce Commission; and said orders did not require increases in lawful rates, but, on the contrary, required increases in intrastate rates found by the Interstate Commerce Commission to be unlawful, in that said rates caused undue preference and undue prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce, on the other, and undue, unreasonable and unjust discrimination against interstate commerce, which is forbidden and declared to be unlawful by Section 13 (4) of the Interstate Commerce Act.

XVIII

Answering paragraph 18, interveners say that the State of Ohio, through the Ohio Commission and otherwise, is entitled to regulate rates for the transportation of bitumi- [fol. 692] nous coal by railroads within the State of Ohio, including the rates referred to in the petition and in the orders of the Interstate Commerce Commission hereinbefore referred to, only to the extent that such regulation is not in conflict with and in contravention of paragraph 3 of Section 8 of Article 1 of the Constitution of the United States and of Acts of Congress regulating interstate commerce pursuant to the authority of said constitutional provision.

XIX

Interveners deny the allegations contained in paragraph 19 of the petition.

XX

Interveners deny each and every allegation of fact and each and every conclusion of law contained in paragraphs 20, 21 and 22 of the petition. Interveners aver that the said orders of the Interstate Commerce Commission hereinbefore referred to were amply supported as to each and every part thereof by substantial evidence; that the findings of fact made by the Commission were also supported by substantial evidence; that such evidence not only justified but required the findings made in these proceedings by the Interstate Commerce Commission. Interveners further aver that no allegations contained in these paragraphs of

the petition have any effect upon the validity of the orders of the Interstate Commerce Commission which are complained of in this cause.

XXI

Interveners are without sufficient information to admit or deny the allegations of paragraph 23 with respect to [fol. 693] plaintiffs investment in building and developing its lines to serve coal mines in the Ohio No. 8, Middle-Coshocton and Massillon Districts. Petitioners, however, deny each and every other allegation of said paragraph. They specifically aver that the enforcement of the orders, orders of the Interstate Commerce Commission hereinbefore referred to, based upon substantial evidence and made pursuant to authority of the Constitution of the United States and Acts of Congress duly passed pursuant thereto, will not irreparably injure or damage the plaintiff and will not deprive it of its property without due process of law.

XXII

Interveners deny the allegations contained in paragraph 24 of the petition.

Further answering paragraphs 15 to 24 of the petition, interveners again aver that the paramount regulatory authority of common carriers of freight and passengers for hire is the Interstate Commerce Commission, by virtue of the powers vested in it by the Congress of the United States under and in accordance with Paragraph 3 of Section 8 of Article 1 of the Constitution of the United States, and interveners aver that, as to the subject-matter of this proceeding, the action of the Public Utilities Commission of Ohio, if not nullified and set aside, in accordance with the findings and orders of the Interstate Commerce Commission hereinbefore referred to, would result in unjust discrimination against interstate commerce and persons and localities engaging in interstate commerce and undue preference in favor of intrastate commerce between points in [fol. 694] Ohio, in violation of Section 13 (4) of the Interstate Commerce Act.

Interveners aver that said report and orders of the Interstate Commerce Commission were made after full hearings before the Interstate Commerce Commission; that at said

hearings and in all proceedings in connection therewith the State of Ohio and the Public Utilities Commission of Ohio, the Plaintiff herein and various Ohio shipping interests were represented by their attorneys, who took an active part in the making of the record in said proceedings; that at said hearings the Interstate Commerce Commission accorded to all parties to said proceedings, including the plaintiff, full and fair opportunity to be heard upon all the matters involved in said investigations; that at said hearings a large volume of testimony and other evidence upon the matters involved was submitted to the Interstate Commerce Commission for consideration on behalf of said parties, including the plaintiff herein, by its attorney; that at said hearings and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties, by their respective counsel, whereupon the Interstate Commerce Commission determined said matters and entered its said report and orders of May 2, 1933, and May 9, 1933.

Interveners further allege that said findings and conclusions and orders of the Interstate Commerce Commission are fully supported by the evidence submitted in said proceedings as aforesaid, and the interveners deny each of and [fol. 695] all the allegations to the contrary contained in the petition.

Except as herein expressly admitted, interveners deny each and all of the allegations contained in the petition herein.

Wherefore interveners pray that the petition in this cause be dismissed.

Charles R. Webber, Attorney for The Baltimore and Ohio Railroad Company. M. Carter Hall, Attorney for the Chesapeake and Ohio Railway Company. Marion B. Pierce, Attorney for Erie Railroad Company. W. S. Bronson, Attorney for Pittsburgh & West Virginia Railway Company. Guernsey Orcutt, Attorney for the Monongahela Railway Company. Leo P. Day, Attorney for the New York Central Railroad Company. W. J. Stevenson, Attorney for the New York, Chicago and St. Louis Railroad Company. D. Lynch

Younger, Attorney for Norfolk & Western Railway Company. Guernsey Orcutt, Attorney for the Pennsylvania Railroad Company. Guernsey Orcutt, Attorney for Pittsburgh, Chartiers and Youghiogheny Railway Company. Leo P. Day, Attorney for the Pittsburgh & Lake Erie Railroad Company. Charles R. Webber, Attorney for Western Maryland Railway Company. John C. Donnally, Attorney for the Virginian Railway Company.

[fol. 696] *Duly sworn to by J. B. McCorkle. Jurat omitted in printing.*

[fol. 697] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1040

[Title omitted]

ORDER GRANTING INTERVENING PETITION—Filed Jan. 13, 1934

Upon consideration of the intervening petition filed herein on June 3, 1933, by the Baltimore & Ohio Railroad Company and other carriers, parties to the proceedings before the Commission in Docket No. 25566, Intrastate Rates on Bituminous Coal within State of Ohio, and it appearing that they have an interest herein and are entitled under the provisions of the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, to intervene herein:

It is ordered, nunc pro tunc as of June 3, 1933, that the said petition be, and the same is hereby, granted.

Hough, United States District Judge. Nevin, United States District Judge.

[fol. 698] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1040

[Title omitted]

PETITION OF WESTERN PENNSYLVANIA COAL TRAFFIC BUREAU AND INDIVIDUAL MEMBERS THEREOF FOR LEAVE TO INTERVENE—Filed June 3, 1933

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

Respectfully come your petitioners Western Pennsylvania Coal Traffic Bureau, a voluntary association of operators of bituminous coal mines in the Freeport, Pittsburgh, and Connellsville districts of Pennsylvania and the individual members thereof, operators of bituminous coal mines and producers and shippers of bituminous coal in the Freeport, Pittsburgh, and Connellsville districts of Pennsylvania, being as follows:

Carnegie Coal Corporation, a corporation,
Chartiers Creek Coal Company, a corporation,
Clinton Block Coal Company, a corporation,
The Greensburg-Connellsville Coal & Coke Company, a corporation,
Hillman Coal & Coke Company, a corporation,
Jamison Coal Corporation, a corporation,
Keystone Coal & Coke Company, a corporation,
Langeloth Coal Company, a corporation,
Lindley Coal Company, a corporation,
McClane Mining Company, a corporation,
Ocean Coal Company, a corporation,
Pittsburgh Coal Company, a corporation,
South Fayette Coal Company, a corporation,
Union Collieries Company, a corporation,
Westmoreland Coal Company, a corporation,

and represent that they have a substantial interest in [fol. 699] the matters in controversy in the above-entitled

proceeding and desire to intervene as a party thereto and to be represented therein by counsel.

And as grounds for said proposed intervention petitioners respectfully say:

I.

That your individual petitioners in their business of operating bituminous coal mines in the Freeport, Pittsburgh, and Connellsville districts of Pennsylvania, produce and ship bituminous coal in interstate commerce to various destinations, including particularly destinations in northeastern Ohio.

II

That in the proceedings before the Interstate Commerce Commission styled No. 2566, Intrastate Rates on Bituminous Coal within the State of Ohio, and No. 25590, Western Pennsylvania Coal Traffic Bureau, et al. v. The Akron, Canton & Youngstown Railway Company, et al., and the related cases, your petitioners were parties in interest, being complainants in No. 25590 and being interveners in No. 25566 and the related proceedings, and actively participated in said proceedings before the Commission, offered testimony, submitted briefs, and were heard at oral argument by counsel.

That in the proceedings before the Interstate Commerce Commission known as No. 25885, Surcharge on Bituminous Coal within the State of Ohio, your petitioners were parties in inferest, being interveners, and actively participated in said proceedings, offered testimony, submitted briefs, and were heard at oral argument by counsel.

[fol. 700] III

That as producers and shippers of bituminous coal and as parties to said proceeding before the Interstate Commerce Commission in said No. 25566, No. 25590, and the related cases, also in No. 25885, your petitioners have an interest in any suit wherein is involved the validity of any order or requirement of the Interstate Commerce Commission respecting rates on bituminous coal from mines in the Freeport, Pittsburgh, and Connellsville districts of Pennsylvania, and from mines in districts in the State of

Ohio to destinations in northeastern Ohio made and entered by the Interstate Commerce Commission in any such proceeding.

IV

That the petition of the plaintiffs herein, State of Ohio, and Public Utilities Commission of Ohio, seeks to enjoin, abrogate, cancel and set aside two certain orders entered by the Interstate Commerce Commission in said proceedings; and that under and by virtue of the District Court Jurisdiction Act, 38 Stat. L. 319, and under and by virtue of the Commerce Court Act, 36 Stat. L. 539, Sec. 5, any party or parties in interest to the proceedings before the Commission in which an order or requirement is made, may appear as parties thereto of their own motion and as of right and be represented by their counsel in any suit wherein is involved the validity of such order or requirement or any part thereof and the interest of such party.

[fol. 701]

V

Your petitioners respectfully represent that the orders of the Interstate Commerce Commission made and entered in said proceedings are regular and valid and not in derogation of any legal right of the plaintiffs in this proceeding.

Wherefor, your petitioners having been parties in interest to said proceedings before the Interstate Commerce Commission and now having an interest which is involved herein, respectfully pray:

(a) That leave be granted them to intervene in, and be treated as parties hereto, with the right to have notice of, and to appear at the taking of testimony, to produce, examine, and cross-examine witnesses, and to be heard in person or by counsel upon brief and at oral argument;

(b) That due and proper service of this petition for intervention be forthwith made in the manner prescribed and provided for in said District Court Jurisdiction Act;

(c) That this Honorable Court make such other order or orders in respect to this petitioner's position upon the

record and other procedural matters as may be appropriate.

Western Pennsylvania Coal Traffic Bureau, Carnegie Coal Corporation, Chartiers Creek Coal Company, Clinton Block Coal Company, The Greensburg-Connellsville Coal & Coke Company, Hillman Coal & Coke Company, Jamison Coal Corporation, Keystone Coal & Coke Company, Langeloth Coal Company, Lindley Coal Company, McClane Mining Company, Ocean Coal Company, Pittsburgh Coal Company, South Fayette Coal Company, Union Collieries Company, Westmore-
[fol. 702] land Coal Company, by August G. Gutheim, 712 Jackson Place, Washington, D. C., Solicitor.

Duly sworn to by A. S. Boden. Jurat omitted in printing.

[fol. 703] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1040

[Title omitted]

ORDER ALLOWING INTERVENTION—Filed Jan. 13, 1934

On application duly made in open court, June 3, 1933, all of the parties being present and represented by counsel, it is ordered that leave be and the same is hereby granted, to Western Pennsylvania Coal Traffic Bureau and the individual members thereof, being Carnegie Coal Corporation, et al., to file their Petition of Intervention herein, and their Answer heretofore tendered in support of the validity of the orders of the Interstate Commerce Commission; and also to be, and they hereby are made parties to this cause.

By the Court:

Hough, J. Nevin, J.

[fol. 704] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1040

[Title omitted]

PETITION OF INTERVENTION—Filed June 3, 1933

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

Respectfully come your petitioners, Robert C. Hill, Frank R. Lyon, and Howell Fisher, domiciliary receivers of The Consolidation Coal Company, a corporation of Maryland; Robert C. Hill, Frank R. Lyon, and William H. Koch, ancillary receivers of The Consolidated Coal Company within the Northern District of West Virginia; and The Consolidation Coal Company by its domiciliary and ancillary receivers aforesaid, and represent to the court that they have a substantial interest in the matters involved in the above-entitled proceeding adverse to the interest of the plaintiff therein, and that they desire to intervene in said proceeding, to file an answer therein, and otherwise to participate in the conduct thereof; and for cause show:

I

That petitioner The Consolidation Coal Company is a corporation duly organized and existing under the laws of the State of Maryland, with its principal office in New York City; that petitioners Robert C. Hill, Frank R. Lyon, and Howell Fisher are the duly appointed, qualified, and acting receivers of said company under order of the District Court of the United States for the District of Maryland entered June 2, 1932; that petitioners Robert C. Hill, Frank R. Lyon, and William H. Koch are the duly appointed, qualified, and acting ancillary receivers of said company within the jurisdiction and under the order of the District Court of the United States for the Northern District of West Virginia entered June 3, 1932; and that by said order of June 2, 1932, and by orders entered in said courts on May 26, 1933, and on May 29, 1933 respectively, said primary or

domiciliary receivers and said ancillary receivers were duly authorized to file and prosecute this petition. Said company and its domiciliary and ancillary receivers aforesaid [fol. 705] are hereinafter referred to collectively as petitioners.

II

That the petitioner company owns and for many years has owned bituminous coal mines and mining properties in several States and more particularly in what is generally known as and hereinafter called the Fairmont district in northern West Virginia; that said company for many years prior to the appointment of its receivers as aforesaid was, and the said receivers since their appointment have been and are, engaged in operating said coal mines and in selling and shipping bituminous coal from said mines in interstate commerce; that the term Fairmont district as used in this petition means the Fairmont No. 1, Monongah, Short Line, Opekiska, and Clarksburg districts on The Baltimore and Ohio Railroad, the Fairmont district on the Western Maryland Railway, and those certain districts or groups variously known as Fairmont No. 2 district, Group C, and Group No. 3, on The Monongahela Railway, as more particularly described in tariffs of said carriers; and that among such tariffs are the following:

B. & O. Coal and Coke Series, I. C. C. No. 2620, as amended;
W. M. Ry., I. C. C. No. 8241, as amended;
P. & L. E., I. C. C. No. 2983, as amended;
P. R. R., AA.—I. C. C. No. 2035, as amended.

III

That the petitioners produce in said Fairmont district as above defined bituminous coal suitable for all purposes for which such coal is customarily used and, in volume, of many millions of tons annually; that for many years a very considerable tonnage of such coal has been shipped by petitioners to destinations in northeastern Ohio, that is, in that portion of Ohio generally east of a line drawn through Sandusky, Galion and Columbus, and generally north of an east-and-west line drawn through Columbus.

IV

That in the proceedings before the Interstate Commerce Commission known as Docket No. 25566, Intrastate Rates on Bituminous Coal within the State of Ohio, Investigation & Suspension Docket No. 3801, Coal from Pennsylvania to Northern Ohio, and Investigation & Suspension Docket No. [fol. 706] 3833, Coal from Pennsylvania to Northern Ohio (2), your petitioners through counsel entered their appearances and thereby under that Commission's rules of practice became parties to such proceedings. That your petitioners are complainants in Docket No. 25670, Robert C. Hill, et al. v. A., C. & Y. Railway Co., et al., and interveners in three other proceedings then pending on complaint before the said Commission, to wit: Docket No. 25590, Western Pennsylvania Coal Traffic Bureau v. A., C. & Y. Railway Co., et al., Docket No. 25656, H. W. Showalter, et al. v. A., C. & Y. Railway Co., et al., and Docket No. 25657, Property Owners' Committee et al. v. A., C. & Y. Railway Co., all of which said complaints were consolidated for hearing and heard with the said Docket No. 25566 and Investigation & Suspension Dockets No. 3801 and No. 3833. That your petitioners through counsel entered their appearances in the proceeding known as Docket No. 25885, Surcharge on Bituminous Coal within the State of Ohio, and thereby under the said Commission's rules of practice became parties to such proceeding. That your petitioners actively participated in all of the aforesaid proceedings, offered evidence, submitted briefs, and were heard in oral argument by counsel.

V

That as producers of coal and shippers thereof to destinations in northeastern Ohio, and as parties to all of said proceedings before the said Commission, your petitioners have an interest in any suit wherein is involved the validity of any order or orders or requirement of the said Commission made and entered in said proceedings or any of them.

VI

That by their bill the plaintiff herein, the Wheeling and Lake Erie Railway Company, seeks, under an act of Congress approved October 22, 1913, known as the District Court Jurisdiction Act, C. 32, 38 Stat. 219, U. S. C. Title

28, Section 41, to have this court enjoin, set aside, and annul a certain order entered by said Commission on May 2, 1933, in its said Docket No. 25566, and a certain order entered by said Commission on May 9, 1933, in its said Docket No. 25885. That under said District Court Jurisdiction Act, and under and by virtue of the Commerce Court [fol. 707] Act approved June 18, 1910, 36 Stat. 539, Section 5, U. S. C. Title 28, Section 45a, any parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement, or of any part thereof, and the interest of such party.

VII

Your petitioners respectfully represent that the orders of the said Commission made in the said Dockets No. 25566 and No. 25885 are legal and valid and not in derogation of any legal right of the plaintiff in this suit.

Wherefore your petitioners, having been parties in interest in said Dockets No. 25566 and No. 25885 before the said Commission, and having an interest which is involved herein, respectfully pray:

(1) That leave be granted them to intervene in, and be treated as parties to, this suit with right to have notice of and to appear at, the taking of evidence, to produce, examine, and cross-examine witnesses, and to be heard in person or by counsel upon brief and in oral argument;

(2) That this Honorable Court make such other order or orders in the premises as to it may seem meet and appropriate.

Robert C. Hill, Frank R. Lyon, and Howell Fisher, Domiciliary Receivers of The Consolidation Coal Company, a Corporation of Maryland; Robert C. Hill, Frank R. Lyon, and William H. Koch Ancillary Receivers of The Consolidation Coal Company within the Northern District of West Virginia; and The Consolidation Coal Company by its Domiciliary and Ancillary Receivers aforesaid, by Henry C. Hall, Alex. M. Bull, Attorneys for Petitioners, 716 Jackson Place, N. W., Washington, D. C.

[fols. 708 & 709] *Duly sworn to by Robert C. Hill. Jurat omitted in printing.*

[fols. 710 & 711] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1040

[Title omitted]

ORDER ALLOWING PETITION OF INTERVENTION—Filed Jan. 6, 1934

On application duly made in open court, all of the parties being present and represented by their counsel, it is ordered that leave be and same is hereby granted to Robert C. Hill, Frank R. Lyon, and Howell Fisher, domiciliary receivers of The Consolidation Coal Company, a corporation of Maryland; Robert C. Hill, Frank R. Lyon, and William H. Koch, ancillary receivers of The Consolidation Coal Company within the Northern District West Virginia; and The Consolidation Coal Company by its domiciliary and ancillary receivers aforesaid, to file their petition of intervention and their answer heretofore tendered in support of the validity of the orders of the Interstate Commerce Commission, and to be, and they hereby are, made parties to the cause.

By the Court:

Hough, Judge. Nevin, J.

Columbus, Ohio, June —, 1933.

[fol. 712] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1040

[Title omitted]

ORDER ALLOWING PETITION OF INTERVENTION—Filed Jan. 13, 1934

On application duly made in open court, all of the parties being present and represented by their counsel, it is ordered

that leave be and same is hereby granted to Robert C. Hill, and Howell Fisher, domiciliary receivers of The Consolidation Coal Company, a corporation of Maryland; Robert C. Hill, and William H. Koch, ancillary receivers of The Consolidation Coal Company within the Northern District West Virginia; and The Consolidation Coal Company by its domiciliary and ancillary receivers aforesaid, to file their petition of intervention and their answer heretofore tendered in support of the validity of the orders of the Interstate Commerce Commission, and to be, and they hereby are, made parties to this cause as of June 3, 1933, the date when said petition of intervention and answer were presented to and left with this court sitting in Columbus, Ohio.

By the Court:

Hough, J. Nevin, J.

——, January —, 1934.

[fol. 713] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Equity. No. 1040

[Title omitted]

PETITION OF INTERVENTION AND MOTION TO DISMISS A PORTION OF THE BILL OF COMPLAINT—Filed June 3, 1933

To the Honorable, the Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

And now, this 3d day of June 1933, comes The Public Service Commission of the Commonwealth of Pennsylvania, by its counsel, under the provisions of Sections 212 and 213 of the Judicial Code, 36 Stat. 1150, 1151, 38 Stat. 220, U. S. C. Tit., 28 Section 45a., to intervene and appear specially as a party respondent in the above entitled suit, for the sole purpose of objecting to the venue as to that portion of the Bill of Complaint which seeks an order or injunction restraining the United States of America and the Interstate Commerce Commission from enforcing the order of the Interstate Commerce Commission made in a

proceeding known as No. 25885, Surcharge on Bituminous Coal Within the State of Ohio, under date of May 9, 1933; and as grounds therefor, it shows:

1. The Public Service Commission of the Commonwealth of Pennsylvania, your orator, is an administrative body or commission established for the purpose of regulating public service companies and of carrying out the provisions of the Act of Assembly approved July 26, 1913, P. L. 1374, under which Act your orator was organized according to law.

[fol. 714] 2. This action before your Honorable Court is a suit to suspend or set aside, in whole or in part, the order of the Interstate Commerce Commission in a proceeding known as No. 25885, Surcharge on Bituminous Coal Within the State of Ohio, bearing date of May 9, 1933. A copy of said order and the accompanying report are attached to and made a part of the Bill of Complaint in this matter, and marked Exhibit "B".

3. Said order of the Interstate Commerce Commission was entered in a proceeding before the Interstate Commerce Commission, duly commenced and concluded on petition filed with the Interstate Commerce Commission by your orator, the Public Service Commission of the Commonwealth of Pennsylvania. A certified copy of said petition is attached hereto, made a part hereof and marked Exhibit "A".

4. The Public Service Commission of the Commonwealth of Pennsylvania was a party to said proceedings before the Interstate Commerce Commission, appeared at the hearings, presented evidence at the hearings, filed briefs and participated in the oral argument.

5. The Act of October 22, 1913, c. 32, 38 Stat. 219, U. S. C., Tit. 28, Sec. 43, provides:

"Venue or suits relating to orders of Interstate Commerce Commission. The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue

shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment."

[fol. 715] 6. The office, headquarters and residence of your orator, The Public Service Commission of the Commonwealth of Pennsylvania, is at Harrisburg, Pennsylvania, which is in the judicial district of the United States District Court for the Middle District of Pennsylvania.

7. There was no petitioner in the above proceeding before the Interstate Commerce Commission, who or which resided or now resides in the judicial district of the United States District Court for the Southern District of Ohio Eastern Division.

8. Inasmuch as the plaintiff by its Bill of Complaint undertakes to suspend or set aside, in whole or in part, the above order of the Interstate Commerce Commission through the injunctive process of your Honorable Court, the venue of this action in so far as it seeks to suspend or set aside the above order of the Interstate Commerce Commission is not in the United States District Court for the Southern District of Ohio, Eastern Division, but is in the United States District Court for the Middle District of Pennsylvania.

Wherefore, The Public Service Commission of the Commonwealth of Pennsylvania prays that an order be entered dismissing that portion of the Bill of Complaint which seeks to suspend or set aside the order of the Interstate Commerce Commission made in proceedings known as No. 25885, Surcharge on Bituminous Coal Within the State of Ohio, for want of proper venue.

The Public Service Commission of the Commonwealth of Pennsylvania, by E. Everett Mather, Jr., Assistant Counsel; John Fox Weiss, Counsel.

[fol. 716] *Duly sworn to by Louis Tevell. Jurat omitted in printing.*

[fols. 717-721] Exhibt "A" omitted. Printed side page 347, ante.

[fols. 722 & 723] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1040

[Title omitted]

ORDER ALLOWING INTERVENTION—Filed Jan. 13, 1934

It is hereby ordered that The Public Service Commission of the Commonwealth of Pennsylvania may intervene in this case as a party defendant, as of June 3, 1933.

Hough, J. Nevin, J.

January , 1934.

[fols. 724 & 725] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1040

[Title omitted]

ANSWER OF WESTERN PENNSYLVANIA COAL TRAFFIC BUREAU ET AL., INTERVENING DEFENDANTS, TO BILL OF COMPLAINT—Filed Jan. 6, 1934

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

Come now Western Pennsylvania Coal Traffic Bureau, et al., intervening defendants herein, and by way of first answer to the bill of complaint herein, adopt the answer of Interstate Commerce Commission, defendants herein to said bill of complaint.

All of which matters and things the said intervening defendants are ready to aver, maintain, and prove as this Honorable Court shall direct and hereby prays that said bill of complaint be dismissed.

Western Pennsylvania Coal Traffic Bureau et al., by August G. Gutheim, 712 Jackson Place, Washington, D. C., Solicitor.

Duly sworn to by A. S. Boden. Jurat omitted in printing.

[fol. 726] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1040

[Title omitted]

ANSWER TO BILL OF COMPLAINT—Filed Jan. 6, 1934

To the Honorable Judges of the District Court of the United States for the Southern District of Ohio, Eastern Division:

Come now Robert C. Hill, Frank R. Lyon, and Howell Fisher, domiciliary receivers of The Consolidation Coal Company, a corporation of Maryland; Robert C. Hill, Frank R. Lyon, and William H. Koch, ancillary receivers of The Consolidation Coal Company within the Northern District of West Virginia; and The Consolidation Coal Company by its domiciliary and ancillary receivers aforesaid, intervening defendants herein, and for their answer to the petition or bill of complaint of the plaintiff in the above-entitled suit, say:

I

That they adopt and make their own the answer of defendant The Interstate Commerce Commission to said bill of complaint with like effect as if each admission, denial or averment made by said defendant in its said answer were here made by these intervening defendants, and here set forth at length.

II

That, further answering said bill of complaint, these intervening defendants aver that the granting of said restraining order, temporary injunction, and/or permanent injunction, as prayed for in said bill of complaint, will cause great and irreparable damage and injury to these intervening defendants by diverting business from them to the producers of coal in Ohio with whom they are in competition in the sale of coal to purchasers of coal in northeastern Ohio.

All of which matters and things these intervening defendants are ready to aver, maintain, and prove as the Judges of this Honorable Court shall direct.

[fols. 727 & 728] Wherefore, these intervening defendants pray that the granting of said restraining order, of said temporary injunction, and of said permanent injunction, be severally denied; that the bill of complaint be dismissed; that these intervening defendants be allowed their reasonable costs; and for such further and general relief as to equity pertains.

Robert C. Hill, Frank R. Lyon, and Howell Fisher, Domiciliary Receivers of The Consolidation Coal Company, a Corporation of Maryland; Robert C. Hill, Frank R. Lyon, and William H. Koch, Ancillary Receivers of The Consolidation Coal Company within the Northern District of West Virginia; and The Consolidation Coal Company by its Domiciliary and Ancillary Receivers Aforesaid, by Henry C. Hall, Alex M. Bull, Attorneys for Petitioners, 716 Jackson Place, N. W., Washington, D. C.

Duly sworn to by Robert C. Hill. Jurat omitted in printing.

[fol. 729] [File endorsement omitted]

[fol. 730] IN UNITED STATES DISTRICT COURT

In Equity. No. 1040

[Title omitted]

INTERLOCUTORY INJUNCTION—Filed July 7, 1933

This cause came on for hearing on the application and notice of plaintiffs for an interlocutory injunction and was argued by counsel and submitted to the court; and thereupon the parties in open court stipulated and agreed to submit the cause for final hearing; thereupon the cause came on for final hearing and for a permanent injunction upon the pleadings and evidence and was argued by counsel and the court fixed Saturday, June 24, 1933 for the filing

of briefs by all parties and final submission of the cause; thereafter the Interstate Commerce Commission, upon its own motion, at the request of this court stayed the effective date of its two orders herein complained of until July 10, 1933, but it appearing now that a final decision cannot be rendered by this court as of that date and this court being of the opinion that pending final determination of this suit, plaintiffs are entitled to the preliminary relief prayed for,

It is ordered, adjudged and decreed that the order of the Interstate Commerce Commission of May 2, 1933, in No. 25566, Intrastate Rates on Bituminous Coal in the State of Ohio, and the order of May 9, 1933, in No. 25885, Surcharge on Bituminous Coal within the State of Ohio, and the operation of said orders, be and the same hereby are restrained and suspended until the further order of this court.

——, Judge, Cir. Ct. of App. Robert R. Nevin, District Judge. Benson W. Hough, District Judge.

July 7, 1933.

[fols. 731 & 732] [File endorsement omitted].

IN UNITED STATES DISTRICT COURT

In Equity. No. 1040

[Title omitted]

ORDER SUBSTITUTING EMPIRE SHEET & TIN PLATE COMPANY AS INTERVENING PETITIONER IN PLACE OF C. H. HENKEL, RECEIVER—Filed Jan. 19, 1934

On petition of Empire Sheet & Tin Plate Company to be substituted for C. H. Henkel, Receiver, Empire Steel Corporation, as intervening petitioner,

It is hereby ordered that said petition is granted and Empire Sheet & Tin Plate Company is hereby substituted as intervening petitioner in place of C. H. Henkel, Receiver, Empire Steel Corporation, in this cause.

Hough, Judge.

Dated January —, 1934.

[fol. 733] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

In Equity. No. 1039

STATE OF OHIO and PUBLIC UTILITIES COMMISSION OF OHIO

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

In Equity. No. 1040

THE WHEELING AND LAKE ERIE RAILROAD COMPANY, a Corporation,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

Before Hickenlooper, Circuit Judge, and Hough and Nevin, District Judges

OPINION—Filed Jan. 6, 1934

PER CURIAM:

Each of the present suits is brought to enjoin two orders of the Interstate Commerce Commission, and is, of course, filed under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 28 U. S. C. A. §§ 41 (28)-48. The first of these orders,[1] issued May 2, 1933, under Section 13 of the Interstate Commerce Act as amended February 28, 1920 (c. 91, § 416, 41 Stat. 484), required the increase of Ohio intrastate rates on bituminous coal from certain mining [fol. 734] districts in eastern and southern Ohio to points of destination in northeastern Ohio. The second order, issued May 9, 1933, required the increase in all Ohio intrastate rates on bituminous coal in the amount of the increase (known as the surcharge) authorized in interstate rates on bituminous coal by the Fifteen Per Cent Case, 178 I. C. C. 539, 179 I. C. C. 215, and 191 I. C. C. 361. The

[1] 192 I. C. C. 413.

authorization of this surcharge expired, according to its terms, on September 30, 1933, and was not then renewed, and the surcharge has therefore been discontinued since that date. The validity of this second order has, we think, been conclusively established by the decisions of the United States Supreme Court since the present case was submitted, that is, the decisions on November 6, 1933, in United States, et al. v. Louisiana, et al., 290 U. S. —, and State of Montana v. United States, et al., 290 U. S. —. See also, Kentucky v. United States, 3 F. Supp. 778. Both because of this fact, and because of the discontinuance of the surcharge, we may limit our discussion and consideration here to the question of the validity of the first order above stated.

Through the years there has been established a finely balanced and nicely adjusted schedule of interstate and intrastate rates on bituminous coal from the western Pennsylvania, northern West Virginia and Ohio coal mining districts, to northeastern Ohio, with fixed differentials which have been regarded as essentially reasonable, in view of all the elements which must be considered in rate making. This rate structure with which we are here concerned was last considered by the Interstate Commerce Commission (prior to the investigations here involved) in [fol. 735] Ohio-Michigan Coal Cases, 80 I. C. C. 663, decided June 8, 1923, and the readjustment then made existed in force until August 1, 1932, when the Ohio Public Utilities Commission reduced various intrastate rates to northeastern Ohio, the reductions ranging from 4 to 29 cents per ton. This threw the entire rate structure out of balance, operated to create a competitive advantage in behalf of the Ohio mines and operators, and, by the same token, discriminated against interstate shippers, who had theretofore been in active competition for the business of the several destinations by placing them at a competitive disadvantage.

The Commission not only found that the Ohio intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial to interstate localities and shippers of bituminous coal, but also that the assailed rates "result and will result in undue, unreasonable, and unjust discrimination against interstate commerce in violation of section 13 of the act," in that the "Ohio intrastate traffic

under those assailed rates is not contributing its just proportion to the revenues of the carriers, and by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled." Thus the decision of the case was placed by the Commission both upon the ground that the intrastate rates in question caused unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce on the one hand, and interstate commerce on the other hand, and upon the ground that such rates caused undue and unreasonable discrimination against interstate commerce, as such. Both types of discrimination are forbidden by Section 13.

In a case of this sort we are, of course, concerned only [fol. 736] with the sufficiency of the evidence to support the fact finding of the Commission and the sufficiency of the facts found to support the conclusion of the order entered. While the Commission must act upon evidence and not arbitrarily, and must properly apply the law, the courts are not concerned with "the soundness of the reasoning by which its conclusions are reached, or whether the findings are consistent with those made by it in other cases." Nor are we concerned with the "wisdom" of the regulation which is prescribed. These are matters left by Congress exclusively to the administrative branch of the Government. Among the great number of decisions to this effect, see: Illinois Central R. Co. v. Interstate Commerce Commission, 206 U. S. 441-6; Baltimore & O. R. Co. v. Pitcairn, 215 U. S. 418; Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U. S. 235; Interstate Commerce Commission v. Union Pacific R. Co., 222 U. S. 541, 547; United States v. Louisville & Nashville R. Co., 235 U. S. 314, 320; Manufacturers Ry. Co. v. United States, 246 U. S. 457; Virginian Ry. v. United States, 272 U. S. 658, 665-6; Georgia Commission v. United States, 283 U. S. 765, 775.

Viewed in this light, there is no question, we think, that the order of the Interstate Commerce Commission must stand. It may possibly be that the evidence before, and the subordinate fact-findings of, the Commission are insufficient to sustain the ultimate conclusion of discrimination against interstate commerce as a whole. Florida v. United States, 282 U. S. 194. It is true that there are find-

ings here of the loss to interstate carriers if there were to be a continuance of the diversion of traffic from inter- [fol. 737] state carriers to Ohio intrastate carriers, which diversion had already occurred to a large degree, and findings of the loss of income to interstate carriers if the reductions made in Ohio intrastate rates were also to be reflected in or applied to interstate rates, and this may be enough even under the case just cited. Cf. Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., 257 U. S. 563; New York v. United States, 257 U. S. 591. It is also true that we have here what we did not have in the Florida case—substantial evidence to support the charge of unreasonable preference and prejudice as between persons and localities in intrastate commerce on the one hand, and interstate commerce on the other hand—and that this discrimination as between persons and localities is in itself a discrimination against the persons and localities carrying on that commerce; yet, in view of the holding of the Florida case, that where the Commission undertakes to sustain an order as to intrastate rates on the ground that they impose an undue burden upon the revenues of the carrier, "it must appear that there are findings, supported by evidence, of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which would justify that conclusion," it is possible that the findings in the present case are not full enough or specific enough.

The Florida case also seems to imply that the "discrimination against interstate commerce" mentioned in Section 13 is to be limited solely to that discrimination which imposes an undue burden upon the revenues of the interstate carrier by requiring intrastate service at less than cost, or at well below the interstate level of compensation. [fol. 738] We doubt whether these words should be thus limited in their meaning; and while there may be even greater doubt as to the application of this doctrine, even when so limited, to a case where the loss of revenue is to carriers other than those rendering the intrastate service, on the whole we prefer to place our decision on the single ground of the existence, or non-existence, under the intrastate rates, of preference and prejudice as between persons and localities. We do not believe that it is necessary

to decide any other question, for the right of the Interstate Commerce Commission to remove such preference and prejudice, if it exists, is no longer open to dispute. Louisiana Public Service Commission v. Texas & N. O. R. Co., 284 U. S. 125, 131; Florida v. United States, supra, p. 210.

Nor do we think that it can be disputed, upon the present record, that there is substantial evidence to support the finding of discrimination against persons and localities, if not, in fact, a demonstration of the correctness of that finding. It is urged that the Commission erred in placing the burden of proof upon the plaintiffs to show that the intrastate rates were not unduly preferential to Ohio persons and localities, and unduly prejudicial to persons and localities in other states. We cannot concur. A question of where lies the burden of proof can be of serious moment only when the evidence is in a state of equipoise. Here, with all the evidence before it, the Commission found that the intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers in Pennsylvania and West Virginia. There was no question of the burden of proof presented, for, as we have said, this was practically the only conclusion at which the Commission could have [fol. 739] arrived.

The Commission also found that the interstate rates from the Pittsburgh, Freeport, Connellsville and Fairmount districts to destinations in northeastern Ohio were reasonable. It is contended that the order is void because the Commission did not also examine into and make findings upon all other rates from the Inner and Outer Crescents to northeastern Ohio. This contention is likewise without merit. It is enough if discrimination in respect of the Pittsburgh, Freeport, Connellsville and Fairmount districts, and the coal operators of these districts, be found. There was no obligation upon the Commission to find specifically that each individual rate was reasonable, or that rates from all localities into northeastern Ohio were reasonable. Cf. United States v. Louisiana, supra (decided Nov. 6, 1933). If it be contended that any rate from some other locality is unreasonable, and it is desired in good faith to test this question, the one so contending is afforded a remedy by application to the Interstate Commerce Commission.

It is also contended that under evidence introduced or tendered by the plaintiffs, involving a comparison with the rates and operating conditions in the Indiana and Illinois coal mining districts, the Ohio intrastate rates were shown to be maximum reasonable rates, and the Commission was without power to raise such rates above that reasonable maximum. But the Commission had the power to prescribe intrastate rates in place of those found unduly to discriminate against persons and localities, and when it ordered the resumption of the rates in force prior to August 1, 1932, it necessarily placed its stamp of approval upon those rates as, upon the whole, reasonable. State [fol. 740] Corporation Commission of Virginia v. Aberdeen & Rockfish R. Co., 136 I. C. C. 173, 180. But apart from this, "proceedings to remove unjust discrimination are aimed directly only at the *relation of rates.*" "If the interstate rates are maintained, the discrimination can be removed *only* by raising the intrastate rates." American Express Co. v. Caldwell, 244 U. S. 617, 624. To ask the court to review the decision of the Commission as to whether the disparity should be removed by lowering the interstate rate, or by raising the intrastate rate, or by both, or as to whether, in view of the evidence in regard to the Indiana-Illinois coal rates and operating conditions, the Ohio rates must be regarded as reasonable maximum rates, is asking the court to substitute its judgment for that of the Commission, and to pass upon the soundness of the reasoning of the Commission, the wisdom of its conclusion and the consistency of the present order with those made in other cases. All of these decisions involve the exercise of powers which, under the authorities already cited, the court does not possess.

Lastly, it is urged, but with less vigor, that the intrastate carriers are justified in lowering intrastate rates for competitive reasons, and that only by the lowering of such rates could the Ohio carrier increase its tonnage, in competition with interstate carriers for this identical type of freight elsewhere produced. Compare, Texas & Pac. Ry. Co. v. United States, 289 U. S. 627, 636. The avoidance of such destructive competition, and the establishment of a general policy regarding the national transportation system as a whole, rather than as a number of separate units, were referred to in the case of United States v. Louisiana, [fol. 741] supra, decided November 6, 1933, as among the

purposes of Congress in passing the Transportation Act of 1920. This, we think, is as it should be. Very broad powers have been given the Commission, under section 15-a of the Interstate Commerce Act, to fix rates so that the carriers "as a whole" may earn "an aggregate annual net railway income, equal, as nearly as may be, to a fair return upon the aggregate value of the railway property." It has been said to be impossible "to escape the dovetail relation" between sections 13 (4) and 15-a (Wisconsin R. R. Commission v. Chicago, B. & Q. R. Co., 257 U. S., 563, 586; Florida v. United States, supra, at 211), and we are inclined to the opinion that competition alone is insufficient justification for the disruption of the entire rate structure which has been set up by the Interstate Commerce Commission with all the various elements introduced by the Transportation Act in view. But whether this position be sound or not, we are quite firmly convinced that competition cannot be urged as a justification for the practice of one of the worst evils which the Interstate Commerce Act and its amendment of 1920, the Transportation Act, were designed to end—the undue preference and prejudice of discrimination.

For the reasons above stated the bills in the present case will be dismissed. An order may first be drawn granting the petitions to intervene upon which the court has not yet acted, and then another order dismissing the bills. Decree may be prepared and filed Saturday, Jan'y 13th, 1934.

NOTE.—The above per curiam opinion was prepared by Judge Smith Hickenlooper a short time prior to his death, pursuant to an arrangement had at a conference of the three judge court at Cincinnati on December 2nd, 1933.

Judge Hickenlooper's death ensued, and the opinion was found among his files of the cases involved. It is now published as the opinion of the Court, the Hon. Robert R. [fol. 742] Nevin and the undersigned having entered our concurrence on a copy thereof, filed in the United States District Court (Chambers), Columbus, Ohio.

Benson W. Hough, United States District Judge, Southern District of Ohio.

Dated Columbus, Ohio, January 6th, 1934.

[fol. 743] [File endorsement omitted.]

[fol. 744] IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

In Equity. No. 1040

[Titles omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Jan. 22, 1934

Findings of Fact

1. Through the years there has been established a finely balanced and nicely adjusted schedule of interstate and intrastate rates on bituminous coal from the western Pennsylvania, northern West Virginia and Ohio coal mining districts, to northeastern Ohio, with fixed differentials which have been regarded as essentially reasonable, in view of all the elements which must be considered in rate making. This rate structure was considered by the Interstate Commerce Commission in Ohio-Michigan Coal Cases, 80 I. C. C. 663, decided June 8, 1923, and the readjustment then made existed in force until August 1, 1932, when the [fol. 745] Ohio Public Utilities Commission reduced various intrastate rates to northeastern Ohio, the reductions ranging from 4 to 29 cents per ton. This threw the entire rate structure out of balance, operated to create a competitive advantage in behalf of the Ohio mines and operators, and, by the same token, discriminated against interstate shippers, who had theretofore been in active competition for the business of the several destinations by placing them at a competitive disadvantage.

2. Following the reductions by the Ohio Public Utilities Commission on August 1, 1932, 12 railroad common carriers, all engaged in interstate commerce and all except four also engaged in intrastate commerce within the State of Ohio, filed petitions with the Interstate Commerce Commission alleging in substance that the reductions in the Ohio intrastate rates brought about violations of section 13 (3) and (4) of the Interstate Commerce Act and praying that the Commission institute an investigation to determine whether there were violations of these provisions of section 13.

3. The Interstate Commerce Commission thereupon instituted an investigation to determine whether the then-existing intrastate rates on bituminous coal, in carloads, from certain mining districts in eastern and southern Ohio, namely, Ohio No. 8, Middle, Massillon, Cambridge, Crooksville, Hocking, and Pomeroy districts, to destinations in northeastern Ohio, that is, east of a line drawn through Sandusky and Galion to Columbus and north of a line drawn due east from Columbus to the Ohio-Pennsylvania state line, including Canton, Massillon, Mansfield, Cleveland, Lorain, Huron, Akron, Orrville, Rocky River and intermediate points, would cause any undue or unreasonable advantage, preference or prejudice as between persons or [fol. 746] localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, and also to determine what rates and charges, if any, or what maximum or minimum or maximum and minimum should be prescribed to be charged by said railroads between such origins and destinations for such transportation in order to remove such advantage, preference, prejudice or discrimination, if any, as might be found to exist. All railroads subject to the Commission's jurisdiction operating within the State of Ohio were made respondents to said proceeding. This proceeding was designated Docket No. 25566, Intrastate Rates on Bituminous Coal within State of Ohio.

4. Shortly after the institution of said investigation four formal complaints relating to the same subject matter were filed with the Commission, namely, No. 25590, Western Pennsylvania Coal Traffic Bureau et al. v. Akron, Canton & Youngstown Ry. Co. et al.; No. 25656, H. W. Showalter, Receiver, Continental Coal Co. et al. v. Akron, Canton & Youngstown Ry. Co. et al.; No. 25657, Property Owners' Committee et al. v. Akron, Canton & Youngstown Ry. Co. et al.; and No. 25670, Receivers of Consolidation Coal Co. et al. v. Akron, Canton & Youngstown Ry. Co. et al. These formal complaints alleged, among other things, that the relation between the aforesaid Ohio intrastate rates on bituminous coal, on the one hand, and interstate rates on bituminous coal from various mining districts in Pennsylvania, West Virginia, Virginia and Kentucky to the same Ohio destinations, on the other hand, resulted in undue pref-

erence of persons and localities in Ohio and undue prejudice [fol. 747] against complainants, in violation of sections 3 and 13 of the Interstate Commerce Act. These formal complaint cases were consolidated for hearing with No. 25566 and were heard jointly with that case, and there were also heard and considered with the above-mentioned cases two investigation and suspension cases, namely, Investigation and Suspension Dockets Nos. 3801 and 3833, both entitled Coal from Pennsylvania to Northern Ohio.

5. All of the aforesaid cases were decided by the Commission together in and by report and order dated May 2, 1933, Intrastate Rates on Bituminous Coal within Ohio, 192 I. C. C. 413.

6. The Interstate Commerce Commission, upon petition of the Public Service Commission of the Commonwealth of Pennsylvania, instituted an investigation to determine whether, through refusal of the Public Utilities Commission of Ohio to permit increases (called surcharges) in freight rates on bituminous coal on and after April 1, 1933, for intrastate traffic within the State of Ohio corresponding to those which were approved by the Interstate Commerce Commission for interstate traffic in Fifteen Per Cent Case, 1931, 178 I. C. C. 539, 179 I. C. C. 215, 191 I. C. C. 361, such intrastate rates caused or would cause any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate commerce, on the other hand, or any unjust discrimination against interstate or foreign commerce, and also to determine what rates and charges, if any, or what maximum or minimum, or maximum and minimum, should be prescribed to be charged by the carriers, in order to remove such advantage, preference, prejudice or discrimination, if any, as might be found to exist. All rail- [fol. 748] roads subject to the Commission's jurisdiction operating within the State of Ohio were made respondents to said proceeding which was designated Docket No. 25885. Said case was decided by the Commission in and by report and order dated May 9, 1933, Surcharges on Bituminous Coal within the State of Ohio, 192 I. C. C. 734.

7. In No. 25566, Intrastate Rates on Bituminous Coal within Ohio, which was consolidated with the aforesaid four formal complaint cases, the Commission granted a full hear-

ing, according to all parties to the consolidated proceeding, including the Public Utilities Commission of Ohio and various Ohio shipping interests, full and fair opportunity to be heard upon all matters involved in the proceeding. At the hearing held in said consolidated proceeding a large volume of testimony and other evidence bearing upon the matters involved was submitted to the Commission for consideration on behalf of the parties.

8. The aforesaid report and order of May 2, 1933, in No. 25566, includes the Commission's findings of fact, conclusions, orders and requirements in the premises.

9. In No. 25885, Bituminous Coal within the State of Ohio, the Commission granted a full hearing, according to all parties, including the Public Utilities Commission of Ohio and various Ohio shipping interests, full and fair opportunity to be heard upon all matters involved in the proceeding. At the hearing held in said proceeding a large volume of testimony and other evidence bearing upon the matters involved was submitted to the Commission for consideration on behalf of the parties.

10. The aforesaid report and order of May 9, 1933, in No. 25885, includes the Commission's findings of fact, conclusions, orders and requirements in the premises.

[fol. 749] 11. Each of the present suits is brought to enjoin the two orders of the Interstate Commerce Commission, namely, the order of May 2, 1933, in No. 25566, and the order of May 9, 1933, in No. 25885.

12. The order of May 2, 1933, issued under section 13 of the Interstate Commerce Act as amended by Transportation Act, 1920 (c. 91, sec. 416, 41 Stat. 484) required that the Ohio intrastate rates on bituminous coal from the said mining districts in eastern and southern Ohio to northeastern Ohio be increased so that they would not be lower than the rates in effect immediately prior to August 1, 1932, this latter date being the first date on which reduced intrastate rates prescribed by the Ohio Commission became effective.

13. The order of May 9, 1933, also issued under section 13 of the Interstate Commerce Act, required the increase in all Ohio intrastate rates on bituminous coal in the amount of the increase (known as the surcharge) authorized in in-

terstate rates on bituminous coal by the Fifteen Per Cent Case, 178 I. C. C. 539, 179 I. C. C. 215, and 191 I. C. C. 361. The authorization of this surcharge expired, according to its terms, on September 30, 1933, and was not then renewed, and the surcharge has therefore been discontinued since that date.

14. The Commission not only found that the Ohio intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial to interstate localities and shippers of bituminous coal, but also that the assailed Ohio intrastate rates "result and will result in undue, unreasonable and unjust discrimination against interstate commerce in violation of section 13 of the Act," in that the "Ohio intrastate traffic under these assailed rates is not contributing its just proportion to the revenues of the carriers, and [fol. 750] by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled." Thus the decision of the case was placed by the Commission both upon the ground that the intrastate rates in question cause unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce on the one hand, and interstate commerce on the other hand, and upon the ground that such rates cause undue and unreasonable discrimination against interstate commerce, as such.

15. We find, upon the present record, that it is beyond dispute that there is substantial evidence to support the Commission's finding, if indeed, there is not a demonstration of the correctness of its finding, of unjust discrimination against persons and localities engaged in interstate commerce.

Conclusions of Law

1. The validity of the order of May 9, 1933, Surcharges on Bituminous Coal within Ohio, has been conclusively established by the decisions of the United States Supreme Court since the present case was submitted, that is, the decisions of November 6, 1933, in United States et al. v. Louisiana et al., 290 U. S. —, and State of Montana v. United States et al., 290 U. S. —.

2. The right of the Interstate Commerce Commission to remove undue preference and prejudice as between persons

or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, if any exists, is no longer open to dispute. Louisiana Public Service Commission v. Texas & N. O. R. Co., 284 U. S. 125, 131; Florida v. United States, 282 U. S. 194, 210.

[fol. 751] 3. The contention that the Commission erred in placing the burden of proof upon the plaintiffs to show that the intrastate rates were not unduly preferential to Ohio persons and localities and unduly prejudicial to persons and localities in other states, is without merit. Here, with all the evidence before it, the Commission found that the intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers in Pennsylvania and West Virginia. There was no question of the burden of proof presented, for this was practically the only conclusion at which the Commission could have arrived.

4. The Commission having found that the interstate rates from the Pittsburgh, Freeport, Connellsville and Fairmont districts to destinations in northeastern Ohio were reasonable, it was unnecessary that the Commission examine into and make findings upon all other rates from the inner and outer crescents to northeastern Ohio. The contention that the Commission's order is void for this reason is without merit. It is enough if discrimination in respect of the Pittsburgh, Freeport, Connellsville and Fairmont districts and the coal operators of these districts, be found. There was no obligation upon the Commission to find specifically that each individual rate was reasonable, or that rates from all localities into northeastern Ohio were reasonable. Cf. United States v. Louisiana, 290 U. S. —, decided November 6, 1933. If it be contended that any rate from some other localities is unreasonable, and it is decided in good faith to test this question, the one so contending is afforded a remedy by application to the Interstate Commerce Commission.

[fol. 752] 5. The Commission had the power to prescribe intrastate rates in place of those found unduly to discriminate against persons and localities, and when it ordered the resumption of the rates in force prior to August 1, 1932, it necessarily placed its stamp of approval upon those rates as, upon the whole, reasonable. State Corporation Commission of Virginia v. Aberdeen & Rockfish R. Co., 136 I. C. C. 173,

180. But apart from this, "proceedings to remove unjust discrimination are aimed directly only at the relation of rates." "If the interstate rates are maintained, the discrimination can be removed only by raising the intrastate rates." American Express Co. v. Caldwell, 244 U. S. 617, 624. To ask the court to review the decision of the Commission as to whether the disparity should be removed by lowering the interstate rate, or by raising the intrastate rate, or by both, or as to whether, in view of the evidence in regard to the Indiana-Illinois coal rates and operating conditions, the Ohio rates must be regarded as reasonable maximum rates, is asking the court to substitute its judgment for that of the Commission, and to pass upon the soundness of the reasoning of the Commission, the wisdom of its conclusion and the consistency of the present order with those made in other cases. All of these decisions involve the exercise of powers which, under the authorities already cited, the court does not possess.

6. The avoidance of such destructive competition, and the establishment of a general policy regarding the national transportation system as a whole, rather than as a number of separate units, are among the purposes of Congress in passing the Transportation Act of 1920. United States v. Louisiana, supra. This, we think, is as it should be. Hence the contention that the intrastate carriers are justified in lowering intrastate rates for competitive reasons, and that [fol. 753] only by the lowering of such rates could the Ohio carrier increase its tonnage, in competition with interstate carriers for this identical type of freight elsewhere produced, must be overruled. Very broad powers have been given the Commission, under section 15a of the Interstate Commerce Act, to fix rates so that the carriers "as a whole" may earn "an aggregate annual net railway income, equal, as nearly as may be, to a fair return upon the aggregate value of the railway property." It has been said to be impossible "to escape the dovetail relation" between sections 13 (4) and 15a (Wisconsin R. R. Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 586; Florida v. United States, supra, at 211), and we are inclined to the opinion that competition alone is insufficient justification for the disruption of the entire rate structure which has been set up by the Interstate Commerce Commission with all the various elements introduced by the Transportation Act in view. But

whether this position be sound or not, we are quite firmly convinced that competition cannot be urged as a justification for the practice of one of the worst evils which the Interstate Commerce Act and its amendment of 1920, the Transportation Act, were designed to end—the undue preference and prejudice of discrimination.

7. The Commission's order is valid.

Benson W. Hough, United States District Judge.
Robert R. Nevin, United States District Judge.

[fol. 754] [File endorsement omitted.]

[fol. 755] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

In Equity. No. 1039

STATE OF OHIO and PUBLIC UTILITIES COMMISSION OF OHIO, Petitioners,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

FINAL DECREE VACATING and SETTING ASIDE TEMPORARY INJUNCTION AND DISMISSING THE PETITION.—Filed Jan. 19, 1934.

This cause came on to be heard on final hearing, the District Judge having upon the filing of the petition called to his assistance a Circuit Judge and another District Judge as required by the Act of October 22, 1913, (c. 32, 38 Stat. 208, 220, U. S. C., Title 28, sec. 47) and the Court, so constituted as a statutory court of three judges, upon consideration of the evidence and the arguments of counsel orally and on brief, having concluded, found and determined that the temporary injunction heretofore issued in this cause on July 7, 1933, should be vacated and set aside, and that the petition should be dismissed for want of equity, at the cost of petitioners, it is

Ordered, adjudged, and decreed as follows:

(1) That the temporary injunction heretofore issued in this cause on July 7, 1933, restraining and suspending the operation of the orders of the Interstate Commerce Commission complained of in the above-entitled cause until the further order of the Court be, and the same is hereby, vacated and set aside.

[fol. 756] (2) That the petition be, and the same is hereby, dismissed for want of equity, at the cost of petitioners.

This 19th day of January, 1934.

Benson W. Hough, United States District Judge.
Robert R. Nevin, United States District Judge.

[fol. 757] [File endorsement omitted.]

[fol. 758] In United States District Court for the Southern District of Ohio, Eastern Division.

In Equity. No. 1040.

The Wheeling and Lake Erie Railway Company, Petitioner,

vs.

United States of America and Interstate Commerce Commission, Defendants.

Final Decree Vacating and Setting Aside Temporary Injunction and Dismissing the Petition.—Filed Jan. 19, 1934.

This cause came on to be heard on final hearing, the District Judge having upon the filing of the petition called to his assistance a Circuit Judge and another District Judge as required by the Act of October 22, 1913, (c. 32, 38 Stat. 208, 220, U. S. C., Title 28, sec. 47) and the Court, so constituted as a statutory court of three judges, upon consideration of the evidence and the arguments of counsel orally and on brief, having concluded, found and determined that

the temporary injunction heretofore issued in this cause on July 7, 1933, should be vacated and set aside, and that the petition should be dismissed for want of equity, at the cost of petitioners, it is

Ordered, adjudged, and decreed as follows:

(1) That the temporary injunction heretofore issued in this cause on July 7, 1933, restraining and suspending the operation of the orders of the Interstate Commerce Commission complained of in the above-entitled cause until the [fol. 759] further order of the Court be, and the same is hereby, vacated and set aside.

(2) That the petition be, and the same is hereby, dismissed for want of equity, at the cost of petitioners.

This 19th day of January, 1934.

Benson W. Hough, United States District Judge.
Robert R. Nevin, United States District Judge.

[fol. 760] [File endorsement omitted.]

[fol. 761] In United States District Court

In Equity. No. 1039.

In Equity. No. 1040.

[Titles omitted]

Order for Consolidation—Filed Feb. 10, 1934.

It appearing on inspection of the record that the above entitled causes are of a like nature and relative to the same questions, and the plaintiffs and intervening plaintiffs and the defendants and intervening defendants in both of the [fol. 762] above entitled causes appearing by their attorneys and consenting, it is thereupon

Ordered that said two above entitled causes be and they hereby are consolidated into one cause and shall thereafter proceed as one cause under the title of State of Ohio, Public Utilities Commission of Ohio, The Wheeling and Lake Erie Railway Company, Plaintiffs, and Eastern Ohio Coal Operators' Association, Akron Coal Company, Big Five

Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal and Dock Company, Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company, Wheeling Township Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company, B. F. Goodrich Company, Republic Steel Corporation, Otis Steel Company, Empire Sheet & Tin Plate Company, Board of County Commissioners of Belmont County, Ohio, Burn Ohio Coal Association, The Second National Bank of St. Clairsville, Ohio, St. Clairsville Rotary Club, The Steubenville Clearing House Association, The Cambria Collieries Company, Fisher Body Company, Jaite Company, The Colonial Insulator Company, The United States Stoneware Company, The Klages Coal & Ice Company, The Mansfield Chamber of Commerce, Geogele Bros., The Hanley Milling Company, The Barnes Manufacturing Company, The Hinde & Daugh Paper Company, The Cleveland & Sandusky Brewing Company, The Wagner Quarries Company, George A. Matthes Coal & Supply Company, The Waldock Packing Company, The Sandusky Chamber of Commerce, The Sandusky Packing Company, The Western Reserve Rubber Company, Medusa Portland Cement Company, M. L. Branyan & Bro., Kallmerten & Baer, Inc., Intervening Plaintiffs v. United States of America and Interstate Commerce Commission, Defendants, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, Monongahela Railway Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Norfolk & Western Railway Company, The Pennsylvania Railroad Company, Pittsburgh, Chartiers and Youghiogheny Railway Company, The Pittsburgh & Lake Erie Railroad Company, Western Maryland Railway Company, The Vir-
[fol. 763] ginian Railway Company, Public Service Commission of the Commonwealth of Pennsylvania, Robert C. Hill and Howell Fisher, Domiciliary Receivers of The Consolidation Coal Company, Robert C. Hill and William H. Koch, Ancillary Receivers of The Consolidation Coal Company within the Northern District of West Virginia, The Consolidation Coal Company, Western Pennsylvania Coal

Traffic Bureau, Carnegie Coal Corporation, Chartiers Creek Coal Company, Clinton Block Coal Company, Greensburg-Connellsville Coal & Coke Company, Hillman Coal & Coke Company, Jamison Coal Corporation, Keystone Coal & Coke Company, Langeloth Coal Company, Lindley Coal Company, McClane Mining Company, Ocean Coal Company, Pittsburgh Coal Company, South Fayette Coal Company, Union Collieries Company, Westmoreland Coal Company, Intervening Defendants, In Equity No. 1039, Consolidated Cause.

This order is entered this day as of January 19, 1934.

Charles C. Simms, United States Circuit Judge.
Benson W. Hough, United States District Judge.
——, United States District Judge.

[fol. 764] Approved for entry:

John W. Bricker, Attorney General of the State of Ohio. Donald C. Power, Attorney for the Public Utilities Commission of Ohio. Clan Crawford, Solicitor for The Wheeling and Lake Erie Railway Company. E. S. Ballard, Solicitor for Intervening Plaintiffs. Elmer B. Collins, Special Assistant to the Attorney General of the United States. J. Stanley Payne, Solicitor for the Interstate Commerce Commission. Guernsey, Orcutt, Attorney for The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, Monongahela Railway Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Norfolk & Western Railway Company, The Pennsylvania Railroad Company, Pittsburgh, Chartiers and Youghiogheny Railway Company, The Pittsburgh & Lake Erie Railroad Company, Western Maryland Railway Company, The Virginian Railway Company. John Fox Weiss, Attorney for Public Service Commission of the Commonwealth of Pennsylvania. H. C. Hall, Alex M. Bull, Attorneys for Robert C. Hill and Howell Fisher, Domiciliary Receivers of The Consolidation Coal Company, Robert C. Hill and William H. Koch, Ancillary Receivers of The Consolidation Coal Company within

the Northern District of West Virginia, The Consolidation Coal Company. August G. Gutheim, At-
[fol. 765] torney for Western Pennsylvania Coal Traffic Bureau, Carnegie Coal Corporation, Chartiers Creek Coal Company, Clinton Block Coal Company, Greensburg-Connellsville Coal & Coke Company, Hillman Coal & Coke Company, Jamison Coal Corporation, Keystone Coal & Coke Company, Langeloth Coal Company, Lindley Coal Company, McClane Mining Company, Ocean Coal Company, Pittsburgh Coal Company, South Fayette Coal Company, Union Collieries Company, Westmoreland Coal Company.

[fol. 766] [File endorsement omitted.]

[fol. 767] In United States District Court

In Equity. No. 1039. Consolidated

[Title omitted]

Consent to Severance—Filed March 12, 1934

Now comes Fisher Body Company, The Barnes Manufacturing Company and The Western Reserve Rubber Company, by their Solititor, Ernest S. Ballard, Esquire, and represent to the Court that they are advised that plaintiffs and all other intervening plaintiffs herein are desirous of perfecting an appeal from the final decrees in said Cause or from some part thereof to the Supreme Court of the United States; that the said Fisher Body Company, The Barnes Manufacturing Company and The Western Reserve Rubber Company do not desire to join in said appeal and consent that their interests be severed from the interests of plaintiffs and all other intervening plaintiffs.

Fisher Body Company, The Barnes Manufacturing Company, The Western Reserve Rubber Company, by E. S. Ballard, Their Solicitor.

[fol. 768] [File enforcement omitted]

[fol. 769] IN UNITED STATES DISTRICT COURT

In Equity. No. 1039. Consolidated

[Title omitted]

ORDER OF SEVERANCE—Filed March 12, 1934

It appearing to the Court from the representations of Fisher Body Company, The Barnes Manufacturing Company and The Western Reserve Rubber Company that they do not desire to join in the appeal of the plaintiffs and all other intervening plaintiffs from the final decrees entered in this Cause, or from some part thereof, to the Supreme Court of the United States, and that they consent that their interests be severed from those of plaintiffs and all other intervening plaintiffs;

It is ordered that the interests of said Fisher Body Company, The Barnes Manufacturing Company and The Western Reserve Rubber Company be severed from the interests of plaintiffs and all other intervening plaintiffs in said appeal, and that plaintiffs and all other intervening plaintiffs are hereby empowered to prosecute said appeal without joining said Fisher Body Company or The Barnes Manufacturing Company or The Western Reserve Rubber Company.

Hough, District Judge.

[fol. 770] [File endorsement omitted.]

[fol. 771] IN UNITED STATES DISTRICT COURT

In Equity. No. 1039. Consolidated Cause

[Title omitted]

PETITION FOR APPEAL—Filed March 12, 1934

State of Ohio, Public Utilities Commission of Ohio, and The Wheeling and Lake Erie Railway Company, plaintiffs, and Eastern Ohio Coal Operators Association, Akron Coal Company, Big Five Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal

Company, Lorain Coal and Dock Company, Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company, Wheeling Township Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company, B. F. Goodrich Company, Republic Steel Corporation, Otis Steel Company, Empire Sheet and Tin Plate Company, Board of County Commissioners of Belmont County, Ohio, Burn Ohio Coal Association, The Second National Bank of St. Clairsville, Ohio, St. Clairsville Rotary Club, The Steubenville Clearing House Association, The Cambria Collieries Company, Jaite Company, The Colonial Insulator Company, The United States Stoneware Company, The Klages Coal & Ice Company, The Mansfield Chamber of Commerce, Geogele Bros., The Hanley Milling Company, The Hinds & Daugh Paper Company, The Cleveland & Sandusky Brewing Company, The Wagner Quarries Company, George A. Matthes & Supply Company, The Waldock Packing Company, The Sandusky Chamber of Commerce, The Sandusky Packing Company, Medusa Portland Cement Company, M. L. Branyan & Bro., and Kall-
[fol. 772] merten & Baer, Inc., intervening plaintiffs, feeling themselves aggrieved by so much of the final orders or decrees of the District Court made and entered January 19, 1934, as dismissed for want of equity the portion of plaintiffs' petitions which related to the order of the Interstate Commerce Commission of May 2, 1933, in its docket No. 25566, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final orders or decrees erroneous are set forth in the Assignment of Errors filed herewith to which reference is made.

They pray that a transcript of the record, proceedings and final decrees, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

They further pray that the order of this court allowing this appeal fix and determine the amount of security which they shall give to prosecute their appeal to affect and, if

they fail to make good their plea, to answer all costs which may accrue.

Dated March 12, 1934.

John W. Bricker, Attorney General of Ohio. Donald C. Power (Attorney for Public Utilities Commission of Ohio. Andrew P. Martin, Clan Crawford, Attorneys for The Wheeling and Lake Erie Railway Company. E. S. Ballard, Attorney for Intervening Plaintiffs above named. H. Austen Hauxhurst, Attorney for Empire Sheet and Tin Plate Company.

[fol. 773] [File endorsement omitted]

[fol. 774] In United States District Court for the Southern District of Ohio, Eastern Division

In Equity. No. 1039. Consolidated Cause

State of Ohio et al., Plaintiffs, and Eastern Ohio Coal Operators Association et al., Intervening Plaintiffs

vs.

United States of America, Defendants, and The Baltimore and Ohio Railroad Company et al., Intervening Defendants

Order Allowing Appeal and Fixing Bond—Filed March 12, 1934

In the above entitled cause, State of Ohio, Public Utilities Commission of Ohio and The Wheeling and Lake Erie Railway Company, plaintiffs, and Eastern Ohio Coal Operators Association, Akron Coal Company, Big Five Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal and Dock Company, Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company, Wheeling Township Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company, B. F. Goodrich Company, Republic Steel Corporation, Otis Steel Company,

Empire Sheet and Tin Plate Company, Board of County Commissioners of Belmont County, Ohio, Burn Ohio Coal Association, The Second National Bank of St. Clairsville, Ohio, St. Clairsville Rotary Club, The Steubenville Clearing House Association, The Cambria Collieries Company, Jaite Company, The Colonial Insulator Company, The United States Stoneware Company, The Klages Coal & Ice Company, The Mansfield Chamber of Commerce, Geogele Bros., The Hanley Milling Company, The Hinds & Daugh Paper Company, The Cleveland & Sandusky Brewing Company, The Wagner Quarries Company, George A. Matthes Coal & Supply Company, The Waldock Packing Company, The Sandusky Chamber of Commerce, The Sandusky Packing Company, Medusa Portland Cement Company, M. L. Branyan & Bro., and Kallmerten & Baer, Inc., intervening [fol. 775] plaintiffs, having made and filed their petition praying an appeal to the Supreme Court of the United States from so much of the final orders or decrees of the District Court, entered January 19, 1934, as dismissed for want of equity the portions of plaintiffs' petitions herein which related to the order of the Interstate Commerce Commission of May 2, 1933, in its docket No. 25566, and having also made and filed an assignment of errors and prayer for reversal, and having in all respects conformed to the statutes and rules of court in such cases made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and is made returnable within thirty (30) days from the date hereof; and

It is further ordered, that the clerk of this court prepare and certify a transcript of the record, proceedings and final decrees in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within thirty (30) days from the date hereof; and

It is further ordered, that the plaintiffs and intervening plaintiffs give bond as security for costs on appeal in the sum of One Thousand Dollars ($1,000).

Dated March 12th, 1934.

Hough, District Judge.

[fol. 776] [File endorsement omitted.]

[fols. 777-781] Bond on appeal for $1,000, approved and filed March 12, 1934, omitted in printing.

[fol. 782] In United States District Court

In Equity. No. 1039. Consolidated Cause

[Title omitted]

Assignment of Errors—Filed March 12, 1934

State of Ohio, Public Utilites Commission of Ohio and The Wheeling and Lake Erie Railway Company, plaintiffs, and Eastern Ohio Coal Operators Association, Akron Coal Company, Big Five Coal Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal and Dock Company, Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company, Wheeling Township Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire and Rubber Company, Firestone Tire and Rubber Company, B. F. Goodrich Company, Republic Steel Corporation, Otis Steel Company, Empire Sheet and Tin Plate Company, Board of County Commissioners of Belmont County, Ohio, Burn Ohio Coal Association, The Second National Bank of St. Clairsville, Ohio, St. Clairs-
[fol. 783] ville Rotary Club, The Steubenville Clearing House Association, The Cambria Collieries Company, Jaite Company, The Colonial Insulator Company, The United States Stoneware Company, The Klages Coal & Ice Company, The Mansfield Chamber of Commerce, Geogele Bros., The Hanley Milling Company, The Hinds & Daugh Paper Company, The Cleveland & Sandusky Brewing Company, The Wagner Quarries Company, George A. Matthes Coal & Supply Company, The Waldock Packing Company, The Sandusky Chamber of Commerce, the Sandusky Packing Company, Medusa Portland Cement Company, M. L. Branyan & Bro., and Kallmerten & Baer Inc., intervening plaintiffs, by their respective counsel, now come and, in connection with their petition for appeal, file the following assignment of errors which they aver occurred in the proceedings had in the above entitled cause

and upon which they will rely on their appeal to the Supreme Court of the United States from so much of the final orders or decrees of the District Court, entered January 19, 1934, as dismissed for want of equity the portion of plaintiffs' petitions herein which related to the order of the Interstate Commerce Commission (hereinafter referred to as the Commission) of May 2, 1933, in its docket No. 25566.

The District Court erred:

I. In dismissing plaintiffs' petitions for want of equity.

II. In not suspending, annulling and permanently enjoining the order of the Commission entered on May 2, 1933, in its docket No. 25566.

[fol. 784] III. In not holding that the Commission in making and entering its report and order of May 2, 1933, in its docket No. 25566 exceeded its authority.

IV. In finding:

"Through the years there has been established a finely balance and nicely adjusted schedule of interstate and intrastate rates on bituminous coal from the western Pennsylvania, northern West Virginia and Ohio coal mining districts, to northeastern Ohio, with fixed differentials which have been regarded as essentially reasonable, in view of all the elements which must be considered in rate making. This rate structure was considered by the Interstate Commerce Commission in Ohio Michigan Coal Cases, 80 I. C. C. 663, decided June 8, 1923, and the readjustment then made existed in force until August 1, 1932, when the Ohio Public Utilities Commission reduced various intrastate rates to northeastern Ohio, the reductions ranging from 4 to 29 cents per ton. This threw the entire rate structure out of balance, operated to create a competitive advantage in behalf of the Ohio mines and operators, and, by the same token, discriminated against interstate shippers, who had theretofore been in active competition for the business of the several destinations by placing them at a competitive disadvantage."

V. In finding:

"In No. 25566, Intrastate Rates on Bituminous Coal within Ohio, which was consolidated with the aforesaid four

formal complaint cases, the Commission granted a full hearing, according to all parties to the consolidated proceeding, including the Public Utilities Commission of Ohio and various Ohio shipping interests, full and fair opportunity to be heard upon all matters involved in the proceeding. At the hearing held in said consolidated proceeding a large volume of testimony and other evidence bearing upon the matters involved was submitted to the Commission for consideration on behalf of the parties."

[fol. 785] VI. In finding:

"The Commission not only found that the Ohio intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial to interstate localities and shippers of bituminous coal, but also that the assailed Ohio intrastate rates 'result and will result in undue, unreasonable and unjust discrimination against interstate commerce in violation of section 13 of the Act,' in that the 'Ohio intrastate traffic under these assailed rates is not contributing its just proportion to the revenues of the carriers, and by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled.' Thus the decision of the case was placed by the Commission both upon the ground that the intrastate rates in question cause unreasonable advantage, preference and prejudice as between persons and localities in intrastate commerce on the one hand, and interstate commerce on the other hand, and upon the ground that such rates cause undue and unreasonable discrimination against interstate commerce, as such."

VII. In finding:

"We find, upon the present record, that it is beyond dispute that there is substantial evidence to support the Commission's finding, if indeed, there is not a demonstration of the correctness of its finding, of unjust discrimination against persons and localities engaged in interstate commerce."

VIII. In holding:

"The contention that the Commission erred in placing the burden of proof upon the plaintiffs to show that the intrastate rates were not unduly preferential to Ohio persons

and localities and unduly prejudicial to persons and localities in other states, is without merit. Here, with all the evidence before it, the Commission found that the intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers in Pennsylvania and West Virginia. There was no question of the burden of proof presented, for this was practically the only conclusion at which the Commission could have arrived."

[fol. 786] IX. In holding:

"The Commission having found that the interstate rates from the Pittsburgh, Freeport, Connellsville and Fairmont districts to destinations in northeastern Ohio were reasonable, it was unnecessary that the Commission examine into and make findings upon all other rates from the inner and outer crescents to northeastern Ohio. The contention that the Commission's order is void for this reason is without merit. It is enough if discrimination in respect of the Pittsburgh, Freeport, Connellsville and Fairmont districts, and the coal operators of these districts, be found. There was no obligation upon the Commission to find specifically that each individual rate was reasonable, or that rates from all localities into northeastern Ohio were reasonable. Cf. United States v. Louisiana, 290 U. S. —, decided November 6, 1933. If it be contended that any rate from some other localities is unreasonable, and it is decided in good faith to test this question, the one so contending is afforded a remedy by application to the Interstate Commerce Commission."

X. In holding:

"The Commission had the power to prescribe intrastate rates in place of those found unduly to discriminate against persons and localities, and when it ordered the resumption of the rates in force prior to August 1, 1932, it necessarily placed its stamp of approval upon those rates as, upon the whole, reasonable. State Corporation Commission of Virginia v. Aberdeen & Rockfish R. Co., 136 I. C. C. 173, 180. But apart from this, 'proceedings to remove unjust discrimination are aimed directly only at the relation of rates.' 'If the interstate rates are maintained, the discrimination can be removed only by raising the intrastate rates.' Ameri-

can Express Co. v. Caldwell, 244 U. S. 617, 624. To ask the court to review the decision of the Commission as to whether the disparity should be removed by lowering the interstate rates, or by raising the intrastate rate, or by both, or as to whether, in view of the evidence in regard to the Indiana-Illinois coal rates and operating conditions, the Ohio rates must be regarded as reasonable maximum rates, [fol. 787] is asking the court to substitute its judgment for that of the Commission, and to pass upon the soundness of the reasoning of the Commission, the wisdom of its conclusion, and the consistency of the present order with those made in other cases. All of these decisions involve the exercise of powers which, under the authorities already cited, the court does not possess."

XI. In holding:

"The avoidance of such destructive competition, and the establishment of a general policy regarding the national transportation system as a whole, rather than as a number of separate units, are among the purposes of Congress in passing the Transportation Act of 1920. United States v. Louisiana, supra. This, we think, is as it should be. Hence the contention that the intrastate carriers are justified in lowering intrastate rates for competitive reasons, and that only by lowering of such rates, could the Ohio carrier increase its tonnage, in competition with interstate carriers for this identical type of freight elsewhere produced, must be overruled. Very broad powers have been given the Commission, under section 15a of the Interstate Commerce Act, to fix rates so that the carriers 'as a whole' may earn 'an aggregate annual net railway income, equal, as nearly as may be, to a fair return upon the aggregate value of the railway property.' It has been said to be impossible 'to escape the dovetail relation' between sections 13(4) and 15a (Wisconsin R. R. Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 586; Florida v. United States, supra, at 211), and we are inclined to the opinion that competition alone is insufficient justification for the disruption of the entire rate structure which has been set up by the Inter-State Commerce Commission with all the various elements introduced by the Transportation Act in view. But whether this position be sound or not, we are quite firmly convinced that competition cannot be urged as a justification for the

practice of one of the worst evils which the Interstate Commerce Act and its amendment of 1920, the Transportation Act, were designed to end—the undue preference and prejudice of discrimination."

[fol. 788] XII. In holding:

"The Commission's order is valid."

XIII. In failing to find that the Commission erred in holding that the State of Ohio and other plaintiffs and intervening plaintiffs below had failed to make a sufficiently convincing showing that there should be a departure from the relationship between the intrastate rates under investigation and competitive interstate rates, which existed before the intrastate reductions.

XIV. In failing to find that the Commission erred in holding that when the interstate rates under investigation were found to be at a different level from certain competitive interstate rates, a burden was imposed upon appellants to produce the most convincing evidence of the legality of such intrastate rates.

XV. In faling to find that the Commission's order of May 2, 1933, in its docket No. 25566 cannot be upheld as an exercise of the power to remove undue, unreasonable or unjust discrimination against interstate commerce.

XVI. In failing to find that the order of May 2, 1933, in docket No. 25566, cannot be upheld as an exercise of the power to remove undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate on the one hand and interstate commerce on the other hand.

[fol. 789] XVII. In failing to hold that the finding of the Commission that the rate prescribed by the Ohio Commission by its order of July 25, 1932, in its docket No. 7036, Empire Steel Corporation v. The Baltimore and Ohio Railroad Company, from mines in the Cambridge district to Mansfield, Ohio, caused undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, or undue, unreasonable or unjust discrimination against interstate commerce, was not sup-

ported by evidence and was contrary to the law and the evidence.

XVIII. In failing to find that the Commission erred in making no finding with respect to the reasonableness of numerous related and competitive interstate rates as a basis for requiring increases in the intrastate rates under investigation.

XIX. In failing to find that the Commission's finding of disparity as between the certain interstate rates found by it to be reasonable and the intrastate rates under investigation is not supported by substantial evidence.

XX. In failing to find that the Commission had denied plaintiffs a full hearing.

XXI. In failing to find that the Commission's order of May 2, 1933, in its docket No. 25566, was beyond its jurisdiction.

XXII. In failing to find that the Commission erred in prescribing intrastate rates without having held any hearing to determine whether the intrastate rates under investigation were unlawful.

XXIII. In failing to hold that the Commission erred in refusing to determine and find whether the intrastate rates [fol. 790] under investigation were less than maximum reasonable rates.

XXIV. In failing to hold that the Commission erred in refusing to consider and weigh fairly the evidence of comparative rates in Illinois and Indiana.

XXV. In failing to hold that the Commission erred in finding that coal rates in Ohio should be higher than coal rates in Illinois and Indiana, despite substantial similarity in conditions.

Wherefore plaintiffs and intervening plaintiffs and each of them pray that so much of the final orders or decrees of the District Court, entered January 19, 1934, as dismissed for want of equity the portion of plaintiffs' petitions herein which related to the order of the Commission of May 2, 1933, in its docket No. 25566, be reversed and that they be granted relief as prayed in plaintiffs' original petitions,

and that they be restored to all things that they have lost by reason of said portions of said orders or decrees.

Dated March 12, 1934.

John W. Bricker, Attorney General of Ohio. Donald C. Power, Attorney for Public Utilities Commission of Ohio. Andrew P. Martin, Clan Crawford, Attorneys for The Wheeling and Lake Erie Railway Company. E. S. Ballard, Attorney for Above-named Intervening Plaintiffs. H. Austin Hauxhurst, Attorney for Empire Sheet and Tin Plate Company.

[fol. 791] [File endorsement omitted.]

[fol. 792] IN UNITED STATES DISTRICT COURT

In Equity. No. 1039. Consolidated Cause

[Title omitted]

ORDER APPROVING STATEMENT OF THE EVIDENCE—Filed March 15, 1934

The statement of the evidence lodged in the clerk's office by appellants and consented to by appellees being presented to the Honorable Benson W. Hough, District Judge, and found by him to be true, complete and properly prepared.

It is hereby approved.

Benson W. Hough, District Judge.

[fol. 793] [File endorsement omitted.]

[fol. 794] IN UNITED STATES DISTRICT COURT

In Equity. No. 1039. Consolidated

[Title omitted]

PRECIPE FOR RECORD ON APPEAL

To the Clerk:

Please prepare, certify and transmit to Clerk of The Supreme Court of the United States record on appeal in the above entitled cause, including the following:

1. Plaintiffs' petition in original No. 1039.
2. Plaintiffs' petition in original No. 1040.
3. Answer of United States in original No. 1039.
4. Answer of United States in original No. 1040.
5. Answer of Interstate Commerce Commission in original No. 1039.
6. Answer of Interstate Commerce Commission in original No. 1040.
7. Motion of Eastern Ohio Coal Operators Association, et al., for leave to intervene in original No. 1039.
8. Petition of intervention of Eastern Ohio Coal Operators Association, et al., in original 1039.
9. Entry of leave to Eastern Ohio Coal Operators Asso- [fol. 795] ciation, et al., to intervene in original No. 1039.
10. Motion of Eastern Ohio Coal Operators Association, et al., for leave to intervene in original No. 1040.
11. Petition of intervention of Eastern Ohio Coal Operators Association, et al., in original No. 1040.
12. Entry of leave to Eastern Ohio Coal Operators Association, et al., to intervene in original No. 1040.
13. Motion of Board of County Commissioners of Belmont County, et al., for leave to intervene in original No. 1039.
14. Petition of intervention of Board of County Commissioners of Belmont County, et al., in original No. 1039.
15. Entry of leave to Board of County Commissioners of Belmont County, et al., to intervene in original No. 1039.
16. Motion of Board of County Commissioners of Belmont County, et al., for leave to intervene in original No. 1040.
17. Petition of intervention of Board of County Commissioners of Belmont County, et al., in original No. 1040.
18. Entry of leave to Board of County Commissioners of Belmont County, et al., to intervene in original No. 1040.
19. Petition of intervention and answer of Baltimore and Ohio Railroad Company, et al., in original No. 1039.
20. Entry of leave to Baltimore and Ohio Railroad Company, et al., to intervene as of June 3, 1933, in original No. 1039.
21. Petition of intervention of Baltimore and Ohio Railroad Company, et al., in original No. 1040.
22. Entry of leave to Baltimore and Ohio Railroad Company, et al., to intervene as of June 3, 1933, in original No. 1040.

23. Petition of Western Pennsylvania Coal Traffic Bureau for leave to intervene in original No. 1039.

[fol. 796] 24. Entry of leave to Western Pennsylvania Coal Traffic Bureau to intervene as of June 3, 1933, in original No. 1039.

25. Petition of Western Pennsylvania Coal Traffic Bureau for leave to intervene in original No. 1040.

26. Entry of leave to Western Pennsylvania Coal Traffic Bureau to intervene as of June 3, 1933, in original No. 1040.

27. Petition of R. C. Hill for leave to intervene in original No. 1039.

28. Entry of leave to R. C. Hill, et al., Receivers, to intervene as of June 3, 1933, in original No. 1039.

29. Petition of R. C. Hill for leave to intervene in original No. 1040.

30. Entry of leave to R. C. Hill, et al., Receivers, to intervene as of June 3, 1933, in original No. 1040.

31. Motion of Public Service Commission of the Commonwealth of Pennsylvania for leave to intervene in original No. 1039.

32. Entry of leave to Public Service Commission of Pennsylvania to intervene as of June 3, 1933, in original No. 1039.

33. Motion of Public Service Commission of the Commonwealth of Pennsylvania for leave to intervene in original No. 1040.

34. Entry of leave to Public Service Commission of Pennsylvania to intervene as of June 3, 1933, in original No. 1040.

35. Answer of Western Pennsylvania Coal Traffic Bureau, et al., in original No. 1039.

36. Answer of Western Pennsylvania Coal Traffic Bureau, et al., in original No. 1040.

37. Answer of R. C. Hill, et al., in original No. 1039.

38. Answer of R. C. Hill, et al., in original No. 1040.

[fol. 797] 39. Opinion of Court of January 6, 1934.

40. Findings of Fact and Conclusions of Law.

41. Order substituting Empire Sheet and Tin Plate Company in original No. 1039.

42. Order substituting Empire Sheet and Tin Plate Company in original No. 1040.

43. Final decree dismissing plaintiffs' petition in original No. 1039.

44. Final decree dismissing plaintiffs' petition in original No. 1040.

45. Order consolidating original No. 1039 with original No. 1040.

46. Consent of Fisher Body Company, et al., to severance.

47. Order granting severance.

48. Petition for appeal.

49. Order allowing appeal and fixing bond.

50. Appeal bond.

51. Assignment of errors.

52. Statement as to jurisdiction on appeal.

53. Statement directing attention to the provisions of paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court.

54. Statement of the evidence.

55. Stipulation re statement of evidence.

56. Order approving statement of evidence.

57. Praecipe for record.

58. Order to clerk to transmit original record instead of a transcript thereof.

59. Acknowledgment by appellees of service of appeal papers.

60. Citation and proof of service.

61. Interlocutory injunction of July 7, 1933 in No. 1039.

62. Interlocutory injunction of July 7, 1933 in No. 1040.

63. Affidavit of J. Noble Snider, dated June 2, 1933, entitled in both cases.

64. Affidavit of Roy S. Kern, dated June 3, 1933.

[fols. 798 & 799] 65. Affidavit of W. P. Buffington, filed June 3, 1933.

John W. Bricker, Don C. Power, Andrew P. Martin, Clan Crawford, E. S. Ballard, Attorneys for Appellants.

Appellees, by their counsel, consent to the preparation and transmittal of the record in accordance with the foregoing precipe and waive their right to file a counter praecipe.

John Fox Weiss, J. Stanley Payne, Guernsey Orcutt, Elmer B. Collins, August G. Gutheim, Henry C. Hall, Alex. M. Bull, Attorneys for Appellees.

[fol. 800] In United States District Court

In Equity. No. 1039. Consolidated Cause

[Title omitted]

Order Directing Part of Original Record to be Transmitted on Appeal—Filed March 12, 1934

Good cause appearing therefor,

It is ordered and decreed, that the copies of the exhibits before the Interstate Commerce Commission in its docket No. 25566, received in evidence in the above entitled cause as part of plaintiff's exhibit No. 9, being exhibits numbered in the record before the Interstate Commerce Commission 1 to 421 inclusive, protestant's exhibit A for identification, respondents' exhibits A and B for identification, and three unnumbered exhibits filed with the Commission after the hearing, be transmitted to the Supreme Court on appeal instead of transcripts thereof.

Hough, District Judge.

[File endorsement omitted.]

[fols. 802–804] Citation, in usual form, showing service on Elmer B. Collins et al., filed March 15, 1934, omitted in printing.

[fol. 805] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 805–1] [File endorsement omitted]

In United States District Court

Equity. No. 1039

[Title omitted]

Application by Plaintiffs and Intervening Plaintiffs for Stay Pending Appeal—Filed Jan. 13, 1934

To the Honorable Benson W. Hough and Robert R. Nevin, Judges of Said Court:

Now come the State of Ohio and Public Utilities Commission of Ohio, plaintiffs herein, and Eastern Ohio Coal Operator's Association, Akron Coal Company, Big Five Coal

Company, Cambridge Collieries Company, Clarkson Coal Mining Company, Hanna Coal Company, Lorain Coal & Dock Company, Ohio and Pennsylvania Coal Company, United States Coal Company, Warner Collieries Company, Wheeling Township Coal Mining Company, Youghiogheny & Ohio Coal Company, Cleveland Chamber of Commerce, Akron Chamber of Commerce, Goodyear Tire & Rubber Company, Forestone Tire & Rubber Company, B. F. Goodrich Company, Republic Steel Corporation and Otis Steel Company, intervening plaintiffs herein, and before the entry of a final decree herein, in accordance with the opinion of the court heretofore filed, represent to the Court:

(1) That it is the intention of said plaintiffs and intervening plaintiffs to perfect and prosecute, with all possible expedition, their appeal to the Supreme Court of the United States from so much of the decree to be entered herein as relates to the order of the defendant, The Interstate Commerce Commission, in its Docket No. 25566 entered May 2nd 1933, modified June 8, 1933,

[fol. 805-2] (2) That if said order of said defendant is permitted to take effect irreparable loss and damage will ensue not only to these plaintiffs and intervening plaintiffs, but to all persons engaged in, or dependent upon the business of mining coal in the State of Ohio and shipping said coal by railroad to destinations in northeastern Ohio, and to all consumers of such coal in the portion of the State of Ohio affected by said order, as well as persons in said portions of said state using coal produced in other states, as fully appears from the evidence submitted at the trial of this cause and from the affidavits of William Emery, Jr., and J. L. Ireland, Jr., attached hereto, made a part hereof and filed herewith.

Wherefore, plaintiffs and intervening plaintiffs pray that upon the entering of the final decree in accordance with the said opinion and pending the determination of said appeal said order of said defendant, Interstate Commerce Commission, be stayed and its operation and enforcement suspended and restrained.

(Signed) John W. Bricker, Attorney General of Ohio. (Signed) E. S. Ballard, Solicitor for Intervening Plaintiffs Above named. (Signed) Donald C. Power, Attorney for The Public Utilities Commission of Ohio.

Duly sworn to by E. J. Hopple. Jurat omitted in printing.

[fol. 805-3] IN UNITED STATES DISTRICT COURT

Equity. No. 1039

Equity. No. 1040

[Titles omitted]

AFFIDAVIT OF WILLIAM EMERY, JR.

STATE OF OHIO,
Cuyahoga County, ss:

William Emery, Jr. being duly sworn according to law, deposes and says that he is President of Cambridge Collieries Company, a corporation, one of the intervening plaintiffs herein, which is engaged in producing bituminous coal in the Ohio No. 8 and Cambridge districts in eastern Ohio, and selling said coal to dealers and consumers in northeastern Ohio in competition with bituminous coal produced in the mining districts of western Pennsylvania and northern West Virginia;

That he is vice-president of Eastern Ohio Coal Operators Association, a voluntary association, one of the intervening plaintiffs herein, composed of most of the producers of bituminous coal in the said Ohio No. 8 district;

That he is Chairman of the Ohio Subdivision of Division No. 1 of the Coal Code Authority established pursuant to the Code of Fair Competition of the bituminous coal industry and approved by the President of the United States under the National Recovery Act and that he is also Secretary of said Division No. 1 of said Coal Code Authority; that he has been interested in and connected with the coal mining business for nineteen years;

That he is familiar with the prices and basis for prices of bituminous coal sold to dealers and consumers at destina-
[fol. 805-4] tions in northeastern Ohio affected by the order of the Interstate Commerce Commission of May 2nd, 1933 (as modified) in its Docket No. 25566 here in issue.

That, with the exception of a small amount of coal sold to consumers under special contracts at said destinations,

all of the coal sold at said destinations is sold at f. o. b. mine prices; that if the rates fixed by said order of the Interstate Commerce Commission in its Docket No. 25566 become effective the cost to consumers at said destinations of approximately 98% of the coal mined in the Ohio fields will be increased by the difference between the rates now prevailing and the rates fixed by said order;

The f. o. b. mine prices of coal produced in western Pennsylvania and northern West Virginia for shipment to said destinations in northeastern Ohio have been reduced by varying amounts below the prices of coal produced there for shipment to other destinations because of the present reduced Ohio intrastate coal rates; that if said reductions are discontinued following the taking effect of the Ohio intrastate rates prescribed by said order of the Interstate Commerce Commission, the cost to the consumer at said destinations of such coal will be increased by the amount of said reductions;

That the greater part of the coal consumed at said destinations for steam and domestic purposes originates in western Pennsylvania, northern West Virginia and the State of Ohio and the coal so produced sells and will sell in said destinations for lower prices than other coal used in said destinations for steam and domestic purposes.

(Signed) Wm. Emery, Jr.

Sworn to before me and subscribed in my presence this 12th day of January, 1934. (Signed) A. W. Hanes, Notary Public. My commission expires Feb. 27th, 1936.

[fol. 805-5] IN UNITED STATES DISTRICT COURT

Equity. No. 1039

Equity. No. 1040

[Titles omitted]

AFFIDAVIT OF R. L. IRELAND, JR.

STATE OF OHIO,
Cuyahoga County, ss:

R. L. Ireland, Jr., being duly sworn according to law, deposes and says that he is President of Eastern Ohio Coal

Operators Association, a voluntary association, one of the intervening plaintiffs herein, whose members are producers of coal in the Ohio No. 8 District in Eastern Ohio.

That he is Vice-President of the Hanna Coal Company, a corporation, one of the intervening plaintiffs herein, which is engaged in the production of bituminous coal in said Ohio No. 8 District.

That he has been interested and connected with the coal mining business for thirteen years, and that he is familiar with the conditions under which bituminous coal is produced in the said eastern Ohio District and in other districts of Ohio, and transported to points of consumption within the state of Ohio.

That at the present time a substantial part of the total annual production of coal in the State of Ohio, not less than twenty percent or four million tons, is transported from the mines to the consumer by motor trucks; that part of said truck movement presently takes place from mines in the Middle District of Ohio to consumers at Canton, Massillon and Akron, the railroad rates between which [fol. 805-6] points are to be increased by the order of the Interstate Commerce Commission in its Docket No. 25566 in issue herein.

That in the opinion of affiant if said order in No. 25566 is permitted to take effect, the consequent increases in the railroad rates on coal from said Middle District and from said No. 8 District to Canton, Massillon and Akron, and other destinations in northeastern Ohio, will greatly increase said movement of coal by motor truck from said Middle District to Canton, Massillon and Akron, and will bring about the opening of new truck mines in said Middle District and in said Ohio No. 8 District and the movement of large additional quantities of coal from said Districts to Canton, Massillon and Akron and other destinations in northeastern Ohio, including Cleveland, all of which will correspondingly diminish said movement by railroad.

That the movement of bituminous coal by motor truck within Ohio, including movements to destinations affected by the said order of the Interstate Commerce Commission, has substantially increased since the hearings before the Interstate Commerce Commission in said No. 25566 and is now increasing, and said movement will, in the opinion of

the affiant, be greatly stimulated and increased if said order in No. 25566 is permitted to take effect.

That by reason of the facts stated the coal tonnage which would be lost by the rail mines and rail carriers in Ohio to truck mines and truck carriers if the order in said No. 25566 were permitted to take effect will not inure to the benefit of mines in other states than Ohio and the railroads serving such mines.

(Signed) R. E. Ireland, Jr.

Sworn to before me and subscribed in my presence this 12th day of January, 1934. (Signed) W. C. Kline, Notary Public. (Seal.)

A true copy of the original. Filed Jan. 13, 1934. Attest: Harry F. Rabe, Clerk, by C. P. White, Jr. (Seal.)

[fols. 805-7-12] Application by plaintiffs and intervening plaintiffs for stay pending appeal, Cause No. 1040, and attached affidavits omitted. Printed side page 805-1, ante.

[fol. 805-13] In United States District Court

In Equity. No. 1039

[Title omitted]

Answer of Interstate Commerce Commission to Application by Plaintiffs and Intervening Plaintiffs for Stay of the Operation of the Commission's Order Pending Appeal—Filed Jan. 19, 1934

To the Honorable Charles G. Simons, Circuit Judge; the Honorable Benson W. Hough, District Judge, and the Honorable Robert R. Nevin, District Judge, sitting as a statutory court:

The Interstate Commerce Commission, hereinafter called the Commission, defendant in the above-entitled suit, for answer to the application by plaintiffs and intervening plaintiffs for stay of the operation of the Commission's or-

der of May 2, 1933, in No. 25566, Intrastate Rates on Bituminous Coal within State of Ohio, 192 I. C. C. 413, pending determination of appeal to the Supreme Court of the United States from the final decree in this cause dismissing the petition for want of equity, answers and says:

I

Answering the allegations of paragraph numbered (1) of the application, the Commission calls the Court's attention to the fact that even though plaintiffs carry out their [fol. 805-14] intention as alleged in said paragraph, to perfect and prosecute their appeal "with all possible expedition," it would still be gravely doubtful whether the appeal could be perfected and docketed in the Supreme Court in time for it to be argued and decided at this term of the Supreme Court, since the Supreme Court ordinarily does not sit for hearing arguments after April or, at the latest, early in May. Failing decision this term, it would mean, if this Court should grant a stay, that the Commission's order could not become operative until at least nine months hence, and possibly a year or more, depending upon how promptly the appeal were argued and decided by the Supreme Court, with the result that plaintiffs and intervening plaintiffs would continue to secure the application of rates found by the Commission to be unlawful, in a decision and order upheld as entirely valid by this Court whose opinion found the practice condemned in the Commission's decision and order to be "one of the worst evils which the Interstate Commerce Act and its amendments of 1920, the Transportation Act, were designed to end—the undue preference and prejudice of discrimination."

II

Answering the allegations of paragraph numbered (2) of the application, the Commission denies that irreparable loss and damage will ensue either to plaintiffs, or intervening plaintiffs, or any one else, as the result of the taking effect and operation of the Commission's order. This order, issued with and as part of the Commission's report of May 2, 1933, in a proceeding entitled Docket No. 25566, Intrastate Rates on Bituminous Coal within State of Ohio, 192 I. C. C. 413, is directed against the Baltimore & Ohio

Railroad Company and numerous other common carriers by railroad, subject to the provisions of the Interstate Com-
[fol. 805-15] merce Act, engaged in transporting bituminous coal from mines in Pennsylvania and West Virginia to destinations in northeastern Ohio, in interstate commerce, and from mines in eastern Ohio to the same destinations in northeastern Ohio, in intrastate commerce. The order requires said carriers, respondents in the proceeding before the Commission, "to cease and desist from practicing the undue prejudice as between persons and localities and undue, unreasonable, and unjust discrimination against interstate commerce found in the said report to exist in the relation between the interstate rates on bituminous coal, in carloads, from Pennsylvania and West Virginia to destinations in Ohio, on the one hand, and the intrastate rates on like traffic" from points in Ohio to the same destinations in Ohio, as indicated in the said report, on the other. This undue prejudice and unjust discrimination against interstate shippers and interstate commerce was brought about as the result of reductions in the Ohio Rates, the first of which occurred August 1, 1932, on which date reductions ranging from 4 to 29 cents per ton, prescribed by the Ohio Commission in the rates from the Ohio No. 8, Massillon and Middle districts of Ohio to Massillon City and Canton, Ohio, become effective. Following these first reductions by the Ohio Commission, reductions were made from all the other Ohio districts to northeastern Ohio. Because of the first reductions, discriminations were brought about and each of the succeeding reductions was for the purpose of removing the discrimination, until finally the rates from all the Ohio coal fields to northeastern Ohio were reduced. But the process of rate reductions required or authorized by the Ohio Commission for the purpose of removing discrimination stopped at the State line. That was as far as the authority of the Ohio Commission extended. No corresponding reductions were made from the mining districts beyond the Ohio State line, and, in order to obtain relief from the dis-
[fol. 805-16] criminations brought about against them by reason of the reductions in Ohio, the interstate shippers necessarily appealed to the Interstate Commerce Commission, the only body having jurisdiction over the interstate rates. For a number of years, at least since the decision of the Interstate Commerce Commission in Ohio-Michigan

Coal Cases, 80 I. C. C. 663, in June, 1923, the rate from Ohio No. 8 to Cleveland, as a typical destination, was 10 cents under the Pittsburgh district rate. The Pittsburgh district rate was 6 cents lower than the rate from the Connellsville district, and the latter rate in turn was 9 cents lower than from the Fairmont district. Thus the rate from Ohio No. 8 was 10 cents under Pittsburgh, 16 cents under Connellsville, and 25 cents under Fairmont. The reduction required by the Ohio Commission in the rate from Ohio No. 8 to Cleveland was 29 cents per ton. As the result the rate from Ohio No. 8 became 39 cents under Pittsburgh, 45 cents under Connellsville, and 54 cents under Fairmont. The Commission found that the prevailing interstate rates to northeastern Ohio from the Pittsburgh, Connellsville, Freeport, and Fairmont districts were reasonable rates and that the disparity between these reasonable interstate rates, on the one hand, and the reduced Ohio intrastate rates, on the other hand, unduly preferred the Ohio intrastate shippers and unduly prejudiced the interstate shippers, and also caused unjust discrimination against interstate commerce. To remove the preference, prejudice and discrimination the Commission did not require the carriers to reduce their interstate rates below the reasonable level but required increases in the intrastate rates. Reductions in the interstate rates in question and related interstate rates down to the level of the intrastate rates would have resulted in revenue losses to the carriers of $44,108,248.61 annually if based on [fol. 805-17] the 1929 tonnage, and $29,649,265.34 annually if based on the 1931 tonnage, and would have greatly reduced the carriers' return which even then was far below a fair return. The Commission's order was issued under the authority of section 13 (3) and (4) of the Interstate Commerce Act, and, as required by the mandate of those provisions, prescribes the specific manner in which the undue preference and prejudice and unjust discrimination found by the Commission shall be removed, namely, by restoring the intrastate rates in effect immediately prior to August 1, 1932. When the order becomes effective, plaintiffs and others shipping bituminous coal in intrastate commerce between the Ohio points in question will be compelled to pay the increased rates prescribed in the order for the purpose of removing the undue preference of and advantage to said intrastate shippers and the undue prejudice

and disadvantage now suffered by the interstate shippers resulting from the present intrastate rates, but, should the order be held invalid by the Supreme Court upon appeal, plaintiffs and other Ohio shippers who have paid said increased Ohio intrastate rates in the interim will have the right to restitution of the difference between said increased rates and the rates now in effect. Therefore said order, if permitted to go into effect at once, will not cause plaintiffs or any one else to suffer irreparable injury.

III

Further answering the allegations of paragraph numbered (2) of the application, the Commission alleges that if the operation of its order is stayed pending determination of the appeal by the Supreme Court, the carriers who would otherwise have the benefit of said order will be subjected to irreparable injury in the event the validity of said order [fol. 805-18] is upheld by the Supreme Court, for the reason that the carriers by virtue of outstanding orders of the regulatory body of Ohio will be compelled to maintain and apply intrastate rates now in effect and will have no practicable means of securing restitution of the difference between the present rates and the increased rates which they are ordered and required by the Commission's order to establish, maintain and apply. The Commission found that the Ohio intrastate traffic under the intrastate rates in issue "is not contributing its just proportion to the revenues of the carriers, and by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled." (Report, p. 451.)

IV

Further answering the allegations of paragraph numbered (2) of the application, the Commission alleges that if the operation of its order is stayed pending determination of the appeal by the Supreme Court, the interstate shippers who complained to the Commission and who have intervened in this cause in support of the Commission's order, as well as all other interstate shippers of bituminous coal between the points in question, will suffer irreparable injury in that they will continue to be subjected to the undue prejudice found by the Commission to be caused by the present unlaw-

ful disparity as between the interstate and the Ohio intrastate rates in question resulting from the present unduly low intrastate rates in Ohio, the Commission having found that in Cleveland and at other destinations in northeastern Ohio, to which the rates in question apply, coal from mines in Pennsylvania and West Virginia is highly competitive with coal from Ohio mines; that there is a substantial movement of the coal from those mines to such destinations; that the movement of such coal from the Ohio mines to the Ohio destinations "is at intrastate rates which are generally sub- [fol. 805-19] stantially lower, distance considered, than are the reasonable interstate rates, herein approved, under which such coal is moved to the same destinations from Pennsylvania and West Virginia; that this disparity in rates is greater than is warranted by the differences in transportation conditions from the Ohio mines, on the one hand, and the Pennsylvania and West Virginia mines, on the other"; and that the intrastate rates in issue from the Ohio mines to the destinations in northeastern Ohio "are and for the future will be unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers of bituminous coal from the rate districts as hereinbefore defined in Pennsylvania and West Virginia to the same destinations in Ohio." (Report, page 451). Losses to the interstate shippers because of unlawful disparity as between the intrastate and interstate rates is fully indicated in the Commission's report, pages 420-421, as follows:

"Numerous retail dealers at Cleveland and other northeastern Ohio destinations testified that since the rates were reduced between Ohio points they have been unable to market coal from the Crescents because of the relatively higher price. They explain that they can shrink their profits to meet the differences in rates that existed prior to August 1, 1932, but since that time the Ohio operators' rates have been so much lower than those from the Crescents that it has been impossible to meet the Ohio competition. A witness for the Pittsburgh Coal Company testified in great detail regarding his lost business at Cleveland since the reductions in Ohio. He classified his customers A, B, C, and D. Class A customers consisted of dealers of whom 10 discontinued buying coal upon the Ohio reductions. Class B

customers are those who elected to make no new contracts but continued to buy on spot market basis. All of these customers, numbering 15, were lost after the Ohio reductions, and the tonnage amounted to 646,900 tons annually. Class C customers are those who bought regularly from year to year but under no contract; 60 of these were lost and their tonnage amounted to 149,700 tons annually. Class D are customers who bought from time to time; 39 of these were lost and their tonnage amounted to 123,800 tons annually. Most of those customers are retail dealers and [fol. 805-20] all of this coal was for steam and domestic use. This witness testified that conditions will not change with respect to the marketing of Pittsburgh coal in Ohio until the rate situation is altered.

Another witness, representing a coal producer in the Kanawha and Kenova-Thacker districts, also described his loss of business and difficulty in competing with Ohio mines since the reductions took effect. Similar testimony was given by many other coal operators who have previously shipped their coal to northeastern Ohio to a considerable extent. For example, a witness representing a coal producer on the Monongahela Railway in the Fairmont district estimated that his loss of tonnage to northeastern Ohio would be about 300,000 tons annually because of the reductions made in the Ohio rates. The records is replete with similar instances, including testimony of a representative of the Public Service Commission of Pennsylvania that that State is losing its coal shipments to Ohio and southern fields and that the restoration of the former relationships in rates with the Ohio fields to northeastern Ohio is vital to the mining districts of Pennsylvania. Witnesses testified that since the reduction in the Ohio rates the tonnage from Ohio mines to Cleveland has increased."

Similar losses will continue during the pendency of the appeal if the Commission's order is stayed, and these losses will be irreparable.

V

Further answering said application, the Commission alleges that under pertinent decisions of the Supreme Court the granting of a stay under the facts and circumstances in this case is not justified. In Virginian Ry. Co. v. United

States, 272 U. S. 658, 672-675, the Supreme Court held that a stay is not a matter of right, even if irreparable injury might otherwise result to the appellant; that it is an exercise of judicial discretion; and that the propriety of its issue is dependent upon the circumstances of the particular case. "An application to suspend the operation of the Commission's order pending an appeal from a final decree dis- [fol. 805-21] missing the bill on the merits," the Court said, "calls for the exercise of discretion under circumstances essentially different from those which obtain when the application for a stay is made prior to a hearing of the application for an interlocutory injunction, or after the hearing thereon but before the decision. In the two latter classes of cases, if the bill seems to present to the Court a serious question, the fact that irreparable injury may otherwise result to the plaintiff may, as an exercise of discretion, alone justify granting the temporary stay until there is an opportunity for adequate consideration of the matters involved." "But," said the Court, "to justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown. For the decree creates a strong presumption of its own correctness and of the validity of the Commission's order. This presumption ordinarily entitles defendant carriers and the public to the benefits which the order was intended to secure." After pointing out that in this class of cases an appeal bond can rarely indemnify fully even private parties to the litigation for the loss of the benefits of which the stay deprived them and that the public would usually be left wholly remediless, the Court stated what must be made to appear to justify a stay. The Court said: "To justify granting the stay after a final decree sustaining the Commission's order, it must appear either that the district court entertains a serious doubt as to the correctness of its own decision; or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court."
[fol. 805-22] The Commission alleges that no such showing has been or can be made in this case.

(1) As to doubt of the correctness of the decision of the three-judge court in the case at bar. All three judges concurred in the opinion, without dissent in any particular. In the Virginian case, in which a stay was granted by the District Court, its decree was not unanimous. The Supreme Court said, however, that this fact alone would not justify a stay. The District Court made no finding or statement bearing upon its exercise of discretion in suspending the operation of the Commission's order, except a recital in the decree that from all the evidence in the case it was of opinion that irreparable damage would result to the complainant (Virginian Railway Company) pending such appeal if the decree should be reversed on appeal. The Supreme Court held that this was not sufficient and that under the circumstances appearing the suspension of the Commission's order pending appeal was unwarranted. In Warehouse Co. v. United States, 283 U. S. 501, which from the reported opinions appears to be the only other case in recent years in which such a stay was granted, the decision of the District Court was not unanimous. There the Circuit Judge vigorously dissented from the decision of the two District Judges, 44 Fed. (2d) 379, 386, and the Supreme Court, holding the stay to have been justified, adverted to the fact that the judges of the specially-constituted District Court were not unanimous. 283 U. S., 514. Moreover, the Supreme Court found that the practice complained of was of long standing, entered into so far as appeared in good faith, at a time when the discrimination, if it existed, was much less serious than at the time it was complained of, and before the present prohibitions against discrimination, and the Court further said "the immediate enforcement of the order if the judgment below were not affirmed here [fol. 805-23] would have resulted in a serious and unnecessary disturbance of a course of business affecting not alone the parties to this litigation, but the patrons of the various warehouses, which the Court below found would be irreparable." (Ibid., 514.) In the case at bar the facts are virtually the converse. As found in the unanimous decision of the Court in this case "through the years there has been established a finely balanced and nicely adjusted schedule of interstate and intrastate rates on bituminous coal from the western Pennsylvania, northern West Virginia and Ohio coal-mining districts, to northeastern Ohio,

with fixed differentials which have been regarded as essentially reasonable, in view of all the elements which must be considered in rate making"; that "this rate structure with which we are here concerned was last considered by the Interstate Commerce Commission (prior to the investigations here involved in Ohio-Michigan Coal Cases, 80 I. C. C. 663, decided June 8, 1923, and the readjustment then made existed in force until August 1, 1932, when the Ohio Public Utilities Commission reduced various intrastate rates to northeastern Ohio, the reductions ranging from 4 to 20 cents per ton"; that "this threw the entire rate structure out of balance, operating to create a competitive advantage in behalf of the Ohio mines and operators, and, by the same token, discriminated against interstate shippers, who had theretofore been in active competition for the business of the several destinations by placing them at a competitive disadvantage." The Commission's order, to cure the undue preference of intrastate shippers and unjust discrimination against interstate shippers and commerce, requires restoration of the intrastate rates in effect prior to the reductions by the Ohio regulatory body, thus restoring the finely balanced and nicely adjusted schedule of interstate and intrastate rates theretofore in effect.

[fol. 805-24] The unanimous opinion of the three-judge court in this case seems to leave no room for doubt as to its correctness. The Court found that the putting in of the reduced Ohio rates, which created the preference, prejudice, and discrimination required by the Commission's order to be removed, created a competitive advantage in behalf of the Ohio shippers and discriminated against interstate shippers, who had theretofore been in active competition for the business at the several points of destination, by placing them at a competitive disadvantage; that viewed in the light which the Court must view the order of the Commission under the established law, the Court found that there is no question but that the order of the Commission must stand; that it can not be disputed, upon the record before the Court, that there is substantial evidence to support the finding of discrimination against persons and localities, if not, in fact, a demonstration of the correctness of that finding; that, with all the evidence before it, the Commission found that the intrastate rates were unduly preferential of Ohio shippers and localities and unduly pre-

judicial against interstate localities and shippers in Pennsylvania and West Virginia, and that this was practically the only conclusion at which the Commission could have arrived; that the Commission had the power to prescribe intrastate rates in place of those found unduly to discriminate against persons and localities, and when it ordered the resumption of the intrastate rates in force prior to August 1, 1932, it necessarily placed its stamp of approval upon those rates, as upon the whole reasonable, and that the practice condemned by the Commission is one of the worst evils which the Interstate Commerce Act and its amendment of 1920, the Transportation Act, were designed to end—the undue preference and prejudice of discrimination. The Court [fol. 805-25] also carefully examined the various contentions of the plaintiffs in support of their allegation that the Commission's order was invalid and found them all to be without merit.

(2) There is no conflict in the decision of the courts upon the issues decided herein. This is demonstrated by the fact that each and every order of the Interstate Commerce Commission under section 13 (3) and (4) of the Interstate Commerce Act passed upon by the Supreme Court since the enactment of these provisions in Transportation Act, 1920, has been sustained by that Court, with the single exception of the Florida case, 282 U. S. 194, and the order therein was annulled solely on the ground that the Commission had failed to make proper subordinate findings in support of its ultimate finding of unjust discrimination against interstate commerce resulting from the burden upon the revenues of the carrier caused by the unduly low States rates. The decision in the Florida case was relied upon by counsel for the plaintiffs in this case, was considered by the Court and cited in its opinion as authority for an order of the Commission requiring removal of undue preference and prejudice as between persons or localities in intrastate commerce on the one hand, and persons and localities in interstate commerce on the other hand, the Court's opinion in this case especially referring to page 210 of the Florida decision, in which the Court said:

The power of Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an unjust discrimination against interstate com-

merce is not open to dispute. Houston East & West Texas Ry. Co. v. United States, 234 U. S. 342; Illinois Central Railroad Co. v. State Public Utilities Commission, supra, 245 U. S. 493; Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company, supra, 257 U. S. 563; Arkansas Railroad Commission v. Chicago, Rock Island & Pacific Railroad Company, 274 U. S. 597; Alabama v. United States, 279 U. S. 229."

[fol. 805-26] The section 13 cases passed upon by the Supreme Court since Transportation Act, 1920, in which the Commission's order has been sustained, are Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563; New York v. United States, 257 U. S. 591; N. C. & St. L. Ry. v. Tenn., 262 U. S. 318; United States v. Village of Hubbard, 266 U. S. 474; Alabama v. United States, 279 U. S. 229 and 283 U. S. 776; Georgia Comm. v. United States, 283 U. S. 765; Louisiana Comm. v. United States, 283 U. S. 125; United States v. Louisiana, 290 U. S. —, 78 L. Ed. 50, decided November 6, 1933, not yet officially reported; Montana v. United States, 290 U. S. —, 78 L. Ed. —, decided November 13, 1933, not yet officially reported.

(3) No special reason appears why the order of the Commission ought not to become effective until its validity can be considered by the Supreme Court. On the contrary, strong reasons appear why the Commission's order should become effective promptly. This order is not essentially different from any of the orders in the above-cited cases, in none of which was a stay granted pending appeal to the Supreme Court. Fully supported by adequate findings of undue preference of intrastate shippers and localities to the undue prejudice of interstate shippers and localities, as found and determined by the statutory court, which findings are fully supported and justified by the evidence introduced before the Commission, as found and held by the statutory court, and being clearly within the power of the Commission to make under section 13 (3) and (4) of the Interstate Commerce Act, the Commission's order, prima facie valid when issued, has been found valid in every particular by the statutory court after examination of the record, full argument, both orally and in briefs, and after mature deliberation by the Court.

[fol. 805-27] In Cumberland Tel. Co. v. Pub. Ser. Comm., 260 U. S. 212, 219, the Supreme Court held that notwith-

standing a denial of an injunction on its merits, the Court may properly find that pending a final determination of the suit on the merits in a court of last resort, a "balance of convenience" may be best secured by maintaining the status quo and securing an equitable adjustment of the finally adjudicated rights of all concerned through the conditions of a bond. The Supreme Court further said, however: "But the Court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits, and, therefore, is familiar with the record." The Commission suggests that in the exercise of the nice discretion to determine the "balance of convenience" in this case, the Court should conclude to deny the stay, since if it be denied, the parties seeking it will not suffer irreparable loss but will have the right to restitution, whereas if it be granted, the other parties will suffer losses that will be wholly irreparable.

In the case at bar an equitable adjustment of the finally adjudicated rights of all concerned could not be secured by maintaining the present status quo, for at present the increased rates are not in effect but entry of a final decree dismissing the petitions herein, coupled with denial of a stay will permit the increased rates to become effective promptly and the equitable adjustment of finally adjudicated rights of all concerned could then be secured either through the conditions of a bond or a requirement that all carriers collecting the increased rates shall keep an accurate account in detail of all amounts received by them by reason of the increases in the rates as authorized and required by the Commission's order, specifying by whom [fol. 805-28] or in whose behalf such increases are paid, pending the final determination of this cause, and if upon the final determination of this cause the Commission's order shall be set aside or annulled, the carriers shall refund such increases, with interest, to the persons by whom, or in whose behalf, such amounts were paid by reason of the increases in the rates as authorized and required by said order.

VI

The Commission hereby prays that said application be denied and that final decree vacating and dissolving the

temporary injunction and dismissing the bills for want of equity be entered.

Interstate Commerce Commission, by J. Stanley Payne, Assistant Chief Counsel. Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, Of Counsel.

[File endorsement omitted]

[fols. 805-29–44] Answer of Interstate Commerce Commission to Application by Plaintiffs and Intervening Plaintiffs for Stay of the Operation of the Commission's Order Pending Appeal, Cause No. 1040, omitted. Printed side page 805-13, ante.

[fol. 805-45] IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

[Title omitted]

AFFIDAVIT OF ROY S. KERN—Filed Jan. 19, 1934

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

Roy S. Kern, being first duly sworn, says that he is Chairman of the Coal, Coke & Iron Ore Committee of Central Freight Association Territory, the Ohio Bureau of Coal Statistics, and Agent for the Ohio Coal Tariff Bureau, of which all of the railroads, except the Akron, Canton & Youngstown Railway, respondents in the proceeding before the Interstate Commerce Commission, known as Docket 25566, et al, Intrastate Rates on Bituminous Coal within the State of Ohio, are members; that he has been Chairman of said Coal, Coke & Iron Ore Committee for more than five years and Chairman of and Agent for the said Statistical and Tariff Bureaus since July 1, 1933; that before becoming Chairman of said Committee and Bureaus he was employed by the New York Central Railroad in its Coal Traffic Department for a period of more than ten years; and that he is familiar with the bituminous coal rate

structure obtaining in Ohio, Pennsylvania and West Virginia;

That as Chairman of the said Coal, Coke & Iron Ore Committee, the Ohio Bureau of Coal Statistics, and Agent for the Ohio Coal Tariff Bureau he is informed with respect to the transportation of coal, coke and iron ore within Central Freight Association Territory, and particularly within the State of Ohio, and that he has examined the reports of the Ohio Bureau of Coal Statistics, by him operated since July 1, 1933 and prior thereto by retired Chairman Davis of Columbus, Ohio, on behalf of all of the bituminous coal originating carriers in Central Freight Association Territory, and found that in the period January 1 to November 30, 1933, inclusive there were shipped from origins and origin districts on the lines of carriers, respondents in said Docket 25566, except the Wheeling & Lake Erie Railway, to Akron, Alliance, Canton, Cleveland, Lorain, South Lorain, Mansfield and Massillon, Ohio, and [fol. 805-46] their immediate environs, upon rates affected by said order of the Interstate Commerce Commission, dated May 2, 1933, in the said Docket 25566 and related cases-Intrastate Rates on Bituminous Coal within the State of Ohio, a total of 2,464,588 net tons, and that the difference in the total freight charges actually collected and those which would have resulted had rates found proper by the Interstate Commerce Commission in said decision and order in Docket 25566 and related cases applied was $658,738.71, which extended for the full year of 1933 would represent a total revenue loss to the said carriers of not less than $718,624.05; that failure of the carriers to have assessed and collected rates on this traffic in accordance with said order of the Interstate Commerce Commission from June 10 to December 31, 1933 was due solely to the pendency of the proceedings instituted by the State of Ohio and Wheeling & Lake Erie Railway in the District Court of the United States for the Southern District of Ohio, Eastern Division and the temporary or interlocutory injunctions by said Court entered, and that the revenue losses upon traffic moving during said period totalled at least $419,197.38. Affiant declares that these calculations of revenue losses are the lowest determinable because they are predicated upon tonnages moving to the cities herein named and their immediate environs, whereas the low intrastate

rates required to be increased by the said order of the Interstate Commerce Commission extended to numerous cities, towns and municipalities situated intermediate to such points on the lines of respondent railroads, and that during the entire period bituminous coal has been transported to such intermediate destinations upon the said low intrastate rates, the total amount of which, although a substantial tonnage, is not definitely ascertainable from the reports of the said Ohio Bureau of Coal Statistics; nor do they take into account revenue losses on traffic originating on the line of the Wheeling & Lake Erie Railway Company and moving to the said destinations and points intermediate thereto upon through joint rates in connection with other carriers, respondents in said Docket 25566. The said calculations are furthermore conservative because they do not take into account an indeterminable loss of revenue due to the displacement by Ohio coals of coals normally moving to such points, [fol. 805-47] from origins in adjoining states on rates in all instances substantially higher than those obtaining on Ohio coals, said displacement being the result of the low Ohio intrastate rates found to be preferential and unlawful by the Interstate Commerce Commission. These calculations moreover are made without reference to revenue losses incident to the failure of the said carriers to collect surcharges of 6-cents per net ton authorized by the Interstate Commerce Commission in Ex Parte 103 but suspended and enjoined by acts of the Public Utilities Commission of Ohio and the United States District Court for the Southern District of Ohio, Eastern Division.

With respect to said surcharges, affiant declares that carriers within the State of Ohio by reason of said acts of the Public Utilities Commission of Ohio and the United States District Court for the Southern District of Ohio, Eastern Division, suspending tariffs and enjoining enforcement thereof under order of the Interstate Commerce Commission, were prevented from collecting the said emergency charge of 6 cents per net ton on all bituminous coal traffic moving intrastate in Ohio during the six month period April 1 to September 30, 1933, inclusive, during which period there was transported in intrastate commerce within the State of Ohio a total of 3,316,179 net tons, and that revenues of which the carriers were so deprived would

have amounted to $198,970.74, of which $132,647.16 are directly attributable to the said temporary or interlocutory injunction entered by the United States District Court for the Southern District of Ohio, Eastern Division. This amount, added to the minimum revenue losses indicated in the next preceding paragraph, produces a total revenue loss for the year 1933, calculated on the lowest and most conservative basis, of $917,594.79, of which $551,844.54 are directly attributable to the pendency of said proceedings in the United States District Court for the Southern District of Ohio, Eastern Division.

Affiant further declares that to the best of his knowledge and belief the revenue losses as herein set forth, as well as additional and substantial losses of an indeterminable character, are irretrievable and unrecoverable by legal or other process.

[fol. 805-48] Roy S. Kern.

Sworn to before me and subscribed in my presence this 12th day of January, 1934. Elmer H. Fuehr, Notary Public. My Commission expires June 27, 1936. (Seal.)

[File endorsement omitted.]

[fols. 805-49-52] Affidavit of Roy S. Kern, Cause No. 1040, omitted. Printed side page 805-45, ante.

[fol. 805-53] In United States District Court

In Equity. No. 1039

[Title omitted]

Affidavit of Roy S. Kern—Filed Jan. 19, 1934

State of Ohio,
County of Franklin, ss:

Roy S. Kern, being first duly sworn, says that he is the same person who by affidavit sworn to in Allegheny County,

Pennsylvania, on January 12, 1934, and filed in this proceeding, said that revenue losses to carriers respondents in the proceeding before the Interstate Commerce Commission, known as Docket 25566, et al., Intrastate Rates on Bituminous Coal within the State of Ohio, except the Wheeling and Lake Erie Railway Company, resulting from the Ohio Intrastate Bituminous Coal rates in issue amounted to $718,624.05 which represents average monthly revenue losses of $59,885.34.

Affiant now declares that said revenue losses of $59,885.34 per month will in the future continue to be suffered by said respondents until the rates required by the Interstate Commerce Commission's order are made effective: that to the best of his knowledge and belief future revenue losses will exceed this amount because he anticipates that business conditions will improve and that the consumption of bituminous coal will correspondingly increase;

That because thereof affiant states the above forecast of future revenue losses is substantially less than will be suffered if the Intrastate rates are further continued and must be treated as minimum rather than actual or maximum losses.

Roy S. Kern.

Sworn to before me and subscribed in my presence this 19th day of January, 1934. Wealthy S. Beck, Notary Public in and for Franklin County, Ohio. My term expires May 1, 1936. (Seal.)

[File endorsement omitted.]

[fol. 805-54] Affidavit of Roy S. Kern, Cause No. 1040, omitted. Printed side page 805-54, ante.

[fol. 805-55] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

In Equity. No. 1040

[Titles omitted]

AFFIDAVIT OF J. NOBLE SNIDER, GENERAL MANAGER OF SALES, RECEIVERS OF THE CONSOLIDATION COAL COMPANY—Filed Jan. 19, 1934

STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me, Elon A. Williams, a notary public, in and for the County of New York, State of New York, J. Noble Snider, who, being duly sworn, deposes and says:

That he is General Manager of Sales for the Receivers of The Consolidation Coal Company, and as such has charge of the sales of coal for the Receivers. That he has been General Manager of Sales for The Receivers since June 2, 1932, and prior to that time Vice-President in Charge of Sales for The Consolidation Coal Company since January 1, 1930.

The Consolidation Coal Company is in the hands of Receivers and for convenience the Company and its Receivers are hereinafter referred to collectively as The Consolidation.

The Consolidation is a large and important producer of coal in the Fairmont District, located in northern West Virginia.

Prior to August 1, 1932, The Consolidation shipped approximately ten per cent of its commercial shipments from the Fairmont District into northeastern Ohio territory where it encountered, and still encounters, very severe competition from producers of coal in Ohio, principally in the Ohio No. 8 District.

[fol. 805-56] Prior to August 1, 1932, the rates per ton to Cleveland, Ohio, the principal destination in northeastern Ohio, from the Fairmont District were 25c per ton higher than from the Ohio No. 8 District. From August 1, 1932, to

date, they have been 54c per ton higher except that from April 1, 1933, to September 30, 1933, due to the refusal of the Public Utilities Commission of Ohio to permit the continued application of the 6c per ton emergency charge on Ohio intrastate coal traffic, the rates from Fairmont were 60c per ton higher than from the Ohio No. 8 District.

The increased spread in the rate to Cleveland, Ohio, for example, of 29c in the already existing spread of 25c in the rate on bituminous coal applicable from the Ohio No. 8 and the Fairmont Districts, respectively, both producing substantially the same type of coal, added such a heavy competitive burden as to make it practically impossible for The Consolidation in the marketing of its coal produced in the Fairmont District, to overcome the freight rate advantage enjoyed by the Ohio districts. The disadvantage of Fairmont was more than doubled with the effectiveness of the increased spread in the rates as of August 1, 1932.

Affiant testified before the Interstate Commerce Commission in December, 1932, that according to the best information then available The Consolidation was losing, to competing producers in Ohio, approximately 12,000 to 15,000 tons per month of its general purpose, steam and domestic coal business in northeastern Ohio. In February, 1933, affiant again testified before the said Commission, showing additional losses in that business.

On June 2, 1933, based upon further information affiant executed an affidavit which affiant is advised was presented to this Court on June 3, 1933, that during the period August 1, 1932, to May 31, 1933, The Consolidation had lost to competing producers in Ohio approximately 19,000 to 20,000 tons per month of its general purpose, steam and domestic coal business in northeastern Ohio, and would continue to lose approximately the same amount so long as the reduced rates remained in effect in Ohio.

Since May 31, 1933, The Consolidation has continued to lose to competing Ohio producers general purpose, steam and domestic coal business in an amount not less than 20,000 tons per month.

[fol. 805-57] From August 1, 1932, to December 31, 1933, The Consolidation has lost to competing Ohio producers more than 300,000 tons of its general purpose, steam and domestic coal business in northeastern Ohio.

Affiant believes that so long as the reduced rates in Ohio and the spread in the rates of 54 cents between Ohio No. 8 and Fairmont Districts remain in effect. The Consolidation will continue to lose to competing producers in Ohio approximately the same amount per month of its general purpose, steam and domestic coal business in northeastern Ohio, as it has been losing since August 1, 1932.

J. Noble Snider.

Subscribed to in my presence and sworn to before me in the County of New York, State of New York, by the affiant above named, this 12th day of January, 1934. Elon A. Williams, Notary Public. Notary Public Kings Co. No. 37. Reg. No. 4035. Cert. filed in N. Y. Co. No. 66. Reg. No. 4 W 43. My commission expires Mch. 30, 1934. (Seal.)

[fol.805-58] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

In Equity. No. 1039

In Equity. No. 1040

[Titles omitted]

AFFIDAVIT OF ELMER STRIEBEL, MANAGER, SALES OFFICE, PITTSBURGH COAL COMPANY, CLEVELAND, OHIO—Filed Jan. 19, 1934

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Personally appeared before me, G. A. Hopper, a notary public, in and for the County of Allegheny, State of Pennsylvania, Elmer Striebel, who being duly sworn, deposes and says:

That he is the same Elmer Striebel who testified as a witness before the Interstate Commerce Commission at Columbus, Ohio, December 19, 1932, in the proceeding before said Commission, styled Docket No. 25566 and related cases, Rates on Bituminous Coal Within the State of Ohio, which said testimony is recorded in the transcript of the minutes of the hearing before said Commission at pages 719-740.

That he has ever since December 19, 1932 been, and is now,

Manager of the Sales Office of the Pittsburgh Coal Company in Cleveland, Ohio, and as such is informed concerning and fully conversant with the sales policy of, and sales of bituminous coal by said Pittsburgh Coal Company in Northern Ohio, except in and around Youngstown, Ohio, and has been so informed since long prior to August 1, 1932.

That of contract customers of the Pittsburgh Coal Company in Northeastern Ohio, who on or about August 1, 1932 abrogated their contracts with and discontinued taking coal from the Pittsburgh Coal Company, and began instead to take coal from Ohio producing districts, from which the freight rates had been reduced on or about August 1, 1932, and whose business aggregates approximately 14,300 tons per annum, none has resumed taking coal from said Pittsburgh Coal Company, and all have continued to take coal from Ohio producing districts throughout the period down [fol. 805-59] to and including December 31, 1933.

That of former contract customers of the Pittsburgh Coal Company in Northeastern Ohio, who in prior years had customarily purchased coal from said Pittsburgh Coal Company on contracts for their entire year's requirements and who, on or about April 1, 1932, elected to make no new contracts with said Pittsburgh Coal Company but continued to buy coal from said Pittsburgh Coal Company on a spot market basis, and thereafter discontinued such buying from said Pittsburgh Coal Company on or about August 1, 1932, none has resumed buying coal from said Pittsburgh Coal Company, and all have continued to buy coal from Ohio producing districts from which the freight rates had been reduced on or about August 1, 1932, throughout the period down to and including December 31, 1933; and that the business so lost and continued to be lost by said Pittsburgh Coal Company, down to and including December 31, 1933, aggregates approximately 646,900 tons per annum.

That of regular spot customers of the Pittsburgh Coal Company in Northeastern Ohio, who were actually buying coal from said company up to August 1, 1932, and who then discontinued buying coal from said Pittsburgh Coal Company and commenced buying coal from competing producing districts in Ohio, customers whose business aggregates approximately 2000 tons per annum have resumed buying coal from said Pittsburgh Coal Company, and all other such customers have not resumed buying coal from said Pittsburgh Coal Company, up to and including December 31, 1933, but

have continued to take coal from competing producing districts, from which the rates on bituminous coal to Northeastern Ohio were reduced on or about August 1, 1932, and that the business so lost and continued to be lost aggregates 147,700 tons annually.

That of potential customers of the Pittsburgh Coal Company in Northeastern Ohio, with business aggregating 123,800 tons annually, considered as prospects for coal sold by the Pittsburgh Coal Company, on or about August 1, [fol. 805-60] 1932, and since, none have commenced to purchase coal from said Pittsburgh Coal Company at any time up to and including December 31, 1933.

That in particular markets of Northeastern Ohio to which rates on bituminous coal from producing districts in Ohio were not reduced on or about August 1, 1932, the normal expectancy of business has been retained by the Pittsburgh Coal Company.

That the sales of bituminous coal by the Pittsburgh Coal Company in Northeastern Ohio markets, since on or about August 1, 1932, and down to and including December 31, 1933, have declined to a much greater extent than have the sales by said Pittsburgh Coal Company in any other market territory.

(Sd.) Elmer Striebel.

Subscribed and sworn to before me, at Pittsburgh in the County of Allegheny, and state of Pennsylvania by the affiant above named, this 12th. day of January, 1934. (Sd.) G. A. Hopper, Notary Public. My commission expires Apr. 1, 1935.

[fol. 805-61] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Equity. No. 1039

[Titles omitted]

AFFIDAVIT OF P. C. SPRAGUE—Filed Jan. 19, 1934

STATE OF OHIO,
County of Cuyahoga, ss:

P. C. Sprague being duly sworn according to law, deposes and says that he is Vice President of Hanna Coal

Company, a corporation, one of the intervening plaintiffs herein, which is engaged in producing bituminous coal in the Ohio No. 8 District in eastern Ohio and selling said coal to dealers and consumers in northeastern Ohio in competition with bituminous coal produced in the mining districts of western Pennsylvania, West Virginia and eastern Kentucky;

That he is a member of the Traffic Committee of Eastern Ohio Coal Operators Association, a voluntary association, one of the intervening plaintiffs herein, composed of most of the producers of bituminous coal in the said Ohio No. 8 District;

That he is Chairman of the Marketing Committee of the Ohio Subdivision of Division No. 1 of the Coal Code Authority established pursuant to the Code of Fair Competition of the bituminous coal industry and approved by the President of the United States under the National Re- [fol. 805-62] covery Act; that he has been interested in and connected with the coal mining business for twelve years;

That he is familiar with the prices and the basis for prices of bituminous coal sold to dealers and consumers at destinations in northeastern Ohio affected by the order of the Interstate Commerce Commission of May 2, 1933 (as modified) in its Docket No. 25566 here in issue, with the sources of supply of such coal both within the State of Ohio and in other states including western Pennsylvania, West Virginia and eastern Kentucky, and with the competitive relations among the producers of such coal;

That all coal sold to dealers and consumers in northeastern Ohio as aforesaid, with the exception of a small amount sold under special contracts, is sold at f. o. b. mine prices; that if the rates prescribed by said order of the Interstate Commerce Commission in its Docket No. 25566 become effective the cost to dealers and consumers at said destinations of approximately 98% of the coal produced in Ohio will be increased by the difference between the present rates and the rates prescribed by said order;

That affiant believes that if the prices of Ohio coal sold to consumers and dealers in said destinations as aforesaid are so increased a very large part of the coal now being produced in Ohio and transported by railroad to

said destinations, amounting to many millions of tons per year, will be displaced either by coal produced at other mines in the State of Ohio not served by railroads and will be transported by motor truck from such mines to said destinations, or will be replaced by coal produced at mines in western Pennsylvania, West Virginia and eastern Kentucky and transported by rail or by river and rail to said destinations;

That in the event of such dislocation of business from Ohio mines and railroads as aforesaid to mines served by truck or to mines in other states, the business of mining, selling and transporting bituminous coal will be greatly disturbed and disorganized with resulting widespread unemployment among mine labor and the consequent migra-
[fol. 805-63] tion of mine labor from the mines so deprived of such business to those to which it is transferred, all to the great and irreparable injury of the producers of coal in the State of Ohio and the persons employed in the production of the same and of the railroads transporting such coal;

That if the decree of this Court is reversed on appeal and said order of the Interstate Commerce Commission in No. 25566 is permanently enjoined, the prices of coal produced in Ohio and sold to dealers and consumers in northeastern Ohio as aforesaid will be reduced by the amount of the reductions in the Ohio rates which will thereby be brought about and will be restored to their present basis;

The affiant believes that in the event of such a restoration of the prices of such coal to the present basis the coal lost to Ohio mines and railroads as aforesaid and diverted therefrom to other mines served by motor trucks or to mines in other states will thereupon be diverted back to the Ohio mines now producing such coal, and that the disruption of and interference with the business of producing, selling and transporting coal in Ohio and the consequent interference with mine labor and the resulting unemployment, migration and re-employment will recur in the same manner as heretofore alleged in connection with the shift of such business consequent upon the taking effect

of the rates prescribed by the Interstate Commerce Commission in its said Docket No. 25566.

(S.) P. C. Sprague.

Sworn to before me and subscribed in my presence this 18th day of January, 1934. (S.) H. A. Gale, Notary Public. My commission expires Jan. 31, 1935. (Seal.)

[fol. 805-64] IN UNITED STATES DISTRICT COURT

No. 1039

In Equity. No. 1040

[Title omitted]

ORDER DENYING APPLICATION AS MADE, FOR STAY OF ORDER OF THE INTERSTATE COMMERCE COMMISSION, DATED MAY 2ND, 1933, PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES, BUT GRANTING STAY FOR A PERIOD NOT TO EXCEED SIXTY DAYS, AND REQUIRING DEFENDANT CARRIERS TO PRESERVE AND ACCOUNT FOR ALL AMOUNTS RECEIVED BY THEM BY VIRTUE OF SAID ORDER OF THE INTERSTATE COMMERCE COMMISSION—Filed Jan. 19, 1934

This cause coming on to be heard on application of petitioners for the entry of an order staying the operation and enforcement of the order of the Interstate Commerce Commission dated May 2, 1933, as set forth in the petition in the above-entitled cause, pending the determination of an appeal to the Supreme Court of the United States from the final order and decree of this Court dismissing said petition for want of equity, and the Court having heard the evidence and the argument of counsel, and being fully advised in the premises, finds that said application should be denied; but that the operation and enforcement of the order of the Interstate Commerce Commission dated May 2nd, 1933, herein referred to, be stayed for a period not to exceed sixty days from the date hereof, for the purpose of perfecting an appeal to the Supreme Court of the United States.

The Court further finds that at the expiration of sixty days from the date hereof the intervening defendant car-

riers and The Wheeling and Lake Erie Railway Company, The Lorain & West Virginia Railway Company and The Akron, Canton & Youngstown Railway Company, and each of them, should keep an accurate account in detail of all amounts received by them, by reason of the increase in the rates as authorized and required by said order of the Interstate Commerce Commission dated May 2, 1933, speci- [fol. 805-65] fying by whom or in whose behalf such increases are paid, pending the final determination of this cause, and if upon the final determination of this cause the said order of the Interstate Commerce Commission shall be set aside or annulled, the aforesaid carriers, and each of them, shall refund such increases, to the persons by whom, or in whose behalf, such amounts were paid by reason of the increases in the rates as authorized and required by said order of the Interstate Commerce Commission of May 2, 1933. It is therefore

Ordered, adjudged, and decreed, this 19th day of January, 1934, that said application of petitioners as made, for stay of said order of the Interstate Commerce Commission dated May 2nd, 1933, pending appeal to the Supreme Court of the United States be, and the same is hereby denied; but that the operation and enforcement of the order of the Interstate Commerce Commission dated May 2nd, 1933, herein referred to, be stayed for a period not to exceed sixty days from the date hereof, for the purpose of perfecting an appeal to the Supreme Court of the United States.

It is further ordered, adjudged, and decreed, that at the expiration of sixty days from the date hereof the intervening defendant carriers and The Wheeling and Lake Erie Railway Company, The Lorain & West Virginia Railway Company and the Akron, Canton & Youngstown Railway Company, and each of them, shall keep accurate account in detail of all amounts received by them by reason of the increases in the rates as authorized and required by said order of the Interstate Commerce Commission dated May 2, 1933, specifying by whom, or in whose behalf, such increase are paid, pending the final determination of this cause, and if upon the final determination of this cause the said order of the Interstate Commerce Commission shall be set aside or annulled, the aforesaid carriers, and each of them, shall refund such increases to the persons by whom,

or in whose behalf, such amounts were paid by reason of [fol. 805-66] the increases in the rates as authorized and required by said order of the Interstate Commerce Commission of May 2, 1933.

Charles C. Simons, United States Circuit Judge.
Benson W. Hough, United States District Judge.
Robert R. Nevin, United States District Judge.

[File endorsement omitted.]

[fol. 805-67] UNITED STATES DISTRICT COURT

In Equity. No. 1039

In Equity. No. 1040

[Titles omitted]

APPLICATION FOR ALLOWANCE OF AN APPEAL TO REVIEW IN PART THE FINAL DECREES AND SUPPLEMENTAL ORDERS OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION, ENTERED IN THE ABOVE ENTITLED CAUSES ON THE 19TH DAY OF JANUARY, 1934.—Filed Feb. 15, 1934.

To The Honorable the Associate Justices of the Supreme Court of the United States assigned to the Sixth Circuit:

Now come The United States of America; The Interstate Commerce Commission; The Public Service Commission of the Commonwealth of Pennsylvania; The Baltimore & Ohio Railroad Company; The Chesapeake & Ohio Railroad Company; Erie Railroad Company; The Monongahela Railway Company; The New York Central Railroad Company The [fol. 805-68] New York, Chicago & St. Louis Railroad Company; Norfolk & Western Railway Company; The Pennsylvania Railroad Company; Pittsburgh, Chartiers & Youghiogheny Railroad Company; The Pittsburgh & West Virginia Railway Company; The Pittsburgh & Lake Erie Railroad Company; Western Maryland Railway Company; The Virginian Railway Company; Western Pennsylvania Coal Traffic Bureau, Carnegie Coal Company, et al.; Robert C. Hill and Howell Fisher, Domiciliary Receivers of The Consoli-

dation Coal Company; Robert C. Hill and William H. Koch, Ancillary Receivers of The Consolidation Coal Company within the Northern District of West Virginia; and The Consolidation Coal Company, by its Domiciliary and Ancillary Receivers; and pray allowance of an appeal or appeals direct to the Supreme Court of the United States to review so much of the final decree and supplementary order of the District Court of the United States for the Southern District of Ohio, Eastern Division, (a. three-judge court) severally passed and entered in each of the above entitled causes on the 19th day of January, 1934, in the certain proceedings pending before said Court and entitled as above, as stayed and suspended for a period of sixty days from its own date the certain order of the Interstate Commerce Commission dated May 2d, 1933, entered in said Commission's Docket No. 25,566, Intrastate Rates on Bituminous Coal Within State of Ohio, and in support of such application, these applicants respectfully show:

That effective on or about August 1st, 1932, the Public Utilities Commission of the State of Ohio required these applicants and other carriers operating in the State of Ohio to reduce by substantial amounts their published tariff rates on movements of bituminous coal from producing districts in the State of Ohio to Cleveland, Akron, Lorain, Canton, Massillon, Mansfield and numerous other destination points in the northeastern portion of that State; that thereafter, upon petitions filed by these applicants [fol. 805-69] Interstate Commerce Commission instituted an investigation of the lawfulness of the rates as so reduced by the Public Utilities Commission of Ohio and after extensive hearings wherein the Public Utilities Commission of the State of Ohio and numerous shippers and receivers of coal intrastate in Ohio and interstate from mines in Pennsylvania, West Virginia and other states were heard, the Interstate Commerce Commission handed down its report and order, dated May 2, 1933, I. C. C. Docket No. 25,566, Intrastate Rates on Bituminous Coal within the State of Ohio, in which it held that the reductions in rates required to be made by the Public Utilities Commission of the State of Ohio had resulted in undue prejudice against persons and localities and in unjust discrimination against interstate commerce, and required the removal of the undue prejudice and discrimination so found.

That thereafter, the State of Ohio and others filed in the

United States District Court for the Southern District of Ohio, Eastern Division, petitions to enjoin said order of the Interstate Commerce Commission requiring restoration of the Ohio intrastate rates to their former levels, that is, to the basis which was in effect prior to August 1st, 1932, when the Ohio state authorities required reductions as aforesaid. Said petitions were filed in said District Court on or about May 22, 1933, and docketed as number 1039 and number 1040 on the Equity Docket of said District Court.

Said causes came on for trial on June 3d, 1933, before their Honors, Smith Hickenlooper, Circuit Judge, and Robert R. Nevin and Benson W. Hough, District Judges, and on January 6th, 1934, the District Court, as so constituted, rendered its opinion dismissing the petitions of the State of Ohio and others for want of equity; that on Janu- [fol. 805-70] ary 19, 1934, the District Court entered final decrees in the same proceedings, vacating and setting aside the temporary injunctions it had issued on July 7, 1933, in said cases, and dismissing the petitions for want of equity at the cost of petitioners, but on the same day, to-wit, January 19, 1934, the District Court, on application of the State of Ohio and others, entered a further order, in which it granted a further stay of sixty days of the order of the Interstate Commerce Commission dated May 2, 1933, over objections and protests of these defendants-applicants, and notwithstanding the failure of the State of Ohio and others opposing the order of the Interstate Commerce Commission to make proper or adequate showing that they were entitled to the relief prayed for, and the abundant proof of irreparable damage and injury presented to the District Court by these applicants and other parties supporting the order aforesaid.

Wherefore, your petitioners being aggrieved respectfully pray allowance of an appeal from so much of said final decree and supplementary order of said District Court as stayed and suspended for sixty days the order of the Interstate Commerce Commission, and for such other and further relief as to Your Honors may seem meet and proper.

Elmer B. Collins, for United States of America. J. Stanley Payne, for Interstate Commerce Commission. Guernsey Orcutt, F. D. McKenney, for Other Applicants Above named.

[File endorsement omitted.]

ORDER ALLOWING APPEAL

Appeals allowed; Bond fixed in sum of $500 in each case.
J. C. McReynolds, Associate Justice of the Supreme Court of the United States.

February 3d, 1934.

[fols. 805-71-74] Citations in usual form, filed Feb. 15, 1934, omitted in printing.

[fol. 805-75] IN UNITED STATES DISTRICT COURT

In Equity. No. 1939

In Equity. No. 1040

[Titles omitted]

ASSIGNMENT OF ERRORS—Filed Feb. 15, 1934

The District Court of the United States for the Southern District of Ohio having found and declared that the order of the Interstate Commerce Commission passed on or about the 2d day of May, A. D. 1933, requiring all Ohio intrastate rates on movements of bituminous coal to named destinations in said state of Ohio to be increased so as to avoid ascertained preference in favor of Ohio shippers and localities and undue prejudice against interstate localities and shippers of bituminous coal and discrimination against interstate commerce was justified by substantial evidence and that plaintiffs' bill of complaint filed herein was without equity and of right should be dismissed:

1. It was error to suspend the effectivity of its final decree dismissing the bill of complaint for want of equity by at the same time entering its supplemental order suspending and staying for sixty days the effective date of said order of May 2d, 1933, of said Interstate Commerce Commission, there being no doubt in its own mind as to the correctness of the decision at which it had arrived and which

it had unanimously announced; and no conflict whatever [fol. 805-76] among the courts of the several circuits as to the proper disposition to be made of the questions of law involved nor any showing or even serious attempts to show the existence of any special or even worthy reason why the order of the Interstate Commerce Commission which had been sought to be set aside and which for more than seven months had already been temporarily, and as the event demonstrates, wrongfully stayed, should continue to be held inoperative until its validity should be further considered by the Supreme Court of the United States.

2. It was error in the circumstances to further suspend the effectivity of said order of the Interstate Commerce Commission, when the inevitable result of such suspension was to work irreparable damages to each and every of these Intervenor-Appellants.

(Signed) Elmer B. Collins, For United States of America. (Signed) J. Stanley Payne, for Interstate Commerce Commission. (Signed) Guernsey Orcutt, F. D. McKenney, For Appellants.

[File endorsement omitted.]

[fol. 805-77] In United States District Court

In Equity. No. 1039. Consolidated

[Title omitted]

Præcipe in Cross-Appeal—Filed March 21, 1934

To the Clerk:

Please prepare, certify and transmit to Clerk of The Supreme Court of the United States record on appeal in the above entitled cause, including the following:

1. Application by plaintiffs and intervening plaintiffs for stay pending appeal in No. 1039.

2. Affidavits of William Emery, Jr., and R. L. Ireland, Jr., in Nos. 1039 and 1040, filed with and as part of application referred to in paragraph No. 1 hereof.

3. Application by plaintiffs and intervening plaintiffs for stay pending appeal in No. 1040.

4. Answer of Interstate Commerce Commission to application for stay in No. 1039.

5. Answer of Interstate Commerce Commission to application for stay in No. 1040.

6. Affidavit of Roy S. Kern dated January 12, 1934, in No. 1039.

7. Affidavit of Roy S. Kern dated January 12, 1934, in No. 1040.

[fol. 805-78] 8. Affidavit of Roy S. Kern dated January 19, 1934, in No. 1039.

9. Affidavit of Roy S. Kern dated January 19, 1934, in No. 1040.

10. Affidavit of J. Noble Snider dated January 12, 1934, in Nos. 1039 and 1040 (one paper).

11. Affidavit of Elmer Striebel dated January 12, 1934, in Nos. 1039 and 1040 jointly.

12. Affidavit of P. C. Sprague dated January 18, 1934, in Nos. 1039 and 1040 jointly.

13. Order dated January 19, 1934, granting 60-day stay in No. 1039.

14. Order dated January 19, 1934, granting 60-day stay in No. 1040.

15. Petition of United States and others to The Associate Justice of the United States for allowance of appeal, on which was noted allowance of appeal by Associate Justice McReynolds.

16. Citation on appeal.

17. Assignment of errors.

18. Jurisdictional statement.

19. This præcipe.

Elmer B. Collins, J. Stanley Payne, August G. Gutheim, Henry C. Hall, Alex. M. Bull, John Fox Weiss, Guernsey Orcutt, Attorneys for Cross Appellants.

[fol. 805-79] Appellees, by their counsel, consent to the preparation and transmittal of the record in accordance with the foregoing præcipe and waive their right to file a counter præcipe.

Andrew P. Martin, Clan Crawford, E. S. Ballard, Attorneys for Cross Appellees.

[File endorsement omitted.]

[fol. 805-80] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 805-81] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 868

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION AS TO PRINTING OF RECORD—Filed March 21, 1934

Appellants intend to rely on the following points:

I. In making its report and order in its Docket No. 25566, the Interstate Commerce Commission exceeded its power, in that it undertook and conducted its investigation upon the assumption that the rates made or imposed by authority of the State of Ohio, in issue therein, were in violation of Section 13 (4) of the Interstate Commerce Act (Act of February 28, 1920, c. 91, Sec. 416, 41 Stat. 484, 49 U. S. C. A. Sec. 13, par. (4)) and with the purpose and intention of prescribing other intrastate rates in lieu of said existing rates, regardless of the lawfulness of said existing rates, and did so prescribe other intrastate rates, without having investigated and condemned said existing rates.

[fol. 805-82] II. The Interstate Commerce Commission, in the proceedings had in its Docket No. 25566, denied the State of Ohio and the parties interested in defending intrastate rates made or imposed by its authority a full hearing as to the existence of the facts which are essential conditions to the exercise of the power of the Commission under Section 13 (4) of the Interstate Commerce Act to interfere with intrastate rates, by entering upon the investigation with a view to prescribing intrastate rates for the transportation of coal from certain Ohio mines to certain Ohio destinations, regardless of the existence of such facts.

III. Where intrastate freight rates on a particular commodity from and to particular points made or imposed by authority of the State are investigated by the Interstate Commerce Commission under Section 13 (3) and (4) of the Interstate Commerce Act, the investigation and order of the Commission are controlled by the following principles,

which it violated in its Docket No. 25566, as appears from its report therein:

a. The burden is on the persons attacking the intrastate rates to show that they are unlawful in some respect forbidden by Section 13 (4).

b. The burden is on the persons attacking the intrastate rates to show that the interstate rates, with which it is asserted the intrastate rates should be conformed, are not more than maximum reasonable rates.

c. This burden is not shifted by showing that the intrastate rates are on a lower level than competing, related or similar interstate rates; and this without regard to the [fol. 805-83] antiquity of such interstate rates or of the differences that formerly existed between any of them and such intrastate rates.

d. There are no circumstances that cast upon the State or the persons joining with it to defend its intrastate rates the burden of proving any fact by the most convincing evidence.

IV. There was abundant evidence before the Commission in the proceedings in its Docket No. 25566 to justify a finding in favor of the intrastate rates.

V. In a proceeding before the Interstate Commerce Commission under Section 13 (3) and (4), the Commission is powerless to interfere with existing rates made or imposed by the authority of a State if it is made to appear that such rates are not less than maximum reasonable rates, and the Commission erred in its Docket No. 25566 in excluding and in refusing to consider, weigh fairly and give legal effect to, the evidence offered by the State of Ohio and other parties seeking to sustain the rates made or imposed by its authority for the purpose of showing that the intrastate rates were not less than maximum reasonable rates and that therefore the higher interstate rates were unreasonable.

VI. In its Docket No. 25566, the Interstate Commerce Commission exceeded its authority in that it condemned the rates made or imposed by authority of the State of Ohio, in issue therein, as causing undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and inter-

[fol. 805-84] state commerce on the other hand, without regard to the evidence before it concerning the relative transportation conditions affecting said rates, for the sole reason that said rates changed the differences theretofore existing between the intrastate rates and competitive interstate rates.

VII. In the proceedings in its Docket No. 25566, the Interstate Commerce Commission erroneously condemned the particular intrastate rate on coal from the Cambridge district to Mansfield prescribed by the Public Utilities Commission of Ohio in its Docket No. 7036, Empire Steel Corporation vs. Baltimore and Ohio Railroad Company, although said rate had been so fixed on the same level as the interstate adjustment approved by the Interstate Commerce Commission.

VIII. The Interstate Commerce Commission exceeded its authority, in its Docket No. 25566, in that it required intrastate rates on a particular commodity from and to particular points to be raised to the leved of certain of the existing interstate rates, without first having found that all substantially competitive interstate rates on the same commodity to the same destinations were reasonable or having fixed all such rates at a reasonable level.

IX. The Interstate Commerce Commission, in its Docket No. 25566, exceeded its authority in that, having allowed the interstate rates on a given commodity to given destinations to remain at varying levels, it fixed the intrastate rates on the same commodity to the same destinations at the highest level of the interstate rates, thereby exposing intrastate commerce, and the persons and localities engaged therein, to undue prejudice and unjust discrimination in favor of interstate commerce, and the persons and localities engaged therein, which enjoy the lower interstate rates.

[fol. 805-85] X. The order of the Interstate Commerce Commission in its Docket No. 25566, cannot be upheld as an order requiring the removal of revenue discrimination against interstate commerce for the following reasons:

a. The Commission cannot make a finding of revenue discrimination against interstate commerce in such an investigation under said Section 13 (3) and (4) as its Docket

No. 25566, which relates to the rates on only one commodity from certain points of origin within the State to a small part of the destination territory within the State.

b. The Interstate Commerce Commission cannot make a finding of revenue discrimination and an order requiring the same to be removed by increasing intrastate rates in an investigation under said Section 13 (3) and (4) except after making a finding upon adequate evidence, which finding is wholly lacking in the report in its Docket No. 25566, that such increased intrastate rates will remove or diminish such revenue discriminations by increasing revenues.

John W. Bricker, Attorney General of Ohio. Donald C. Power, Attorney for Public Utilities Commission of Ohio. Clan Crawford, Andrew P. Martin, Attorneys for Wheeling and Lake Erie Railway Company. C. S. Ballard, Attorney for Other Appellants. H. Austin Hauxhurst, Attorney for Empire Sheet and Tin Plate Company.

[fol. 805-86] Acknowledgment of Service

Service of the foregoing definite statement of points to be relied upon by appellants is hereby acknowledged.

Elmer B. Collins, Attorney for the United States of America. J. Stanley Payne, Attorney for Interstate Commerce Commission. John Fox Weiss, Attorney for Public Service Commission of the Commonwealth of Pennsylvania. Guernsey Orcutt, Attorney for Baltimore and Ohio Railroad Company and Other Intervening Railroads. August Gutheim, Attorney for Western Pennsylvania Coal Traffic Bureau and Various Intervening Coal Companies. Henry C. Hall, Alex. M. Bull, Attorneys for Consolidation Coal Company and Receivers Thereof.

[fol. 805-87] Stipulation as to Printing Record and Exhibits

It is stipulated by the parties hereto that the following shall govern the printing of the Record of the District Court in the Appeal in the above entitled cause.

Omit from printing Petitioners' Exhibit No. 8 before the District Court and insert in lieu thereof the following explanatory note:

Petitioners', Exhibit No. 8 before the District Court, being the record before the Interstate Commerce Commission in its Docket No. 25885, omitted in printing because the portions of the decrees below dismissing the portions of the original bills which sought to enjoin the order in said No. 25885 were not appealed from.

Omit from printing the portions of Petitioners' Exhibit No. 9 before the District Court consisting of the following exhibits before the Interstate Commerce Commission:

I. C. C. Exhibits Nos. 1 to 421, both inclusive, including Exhibits Nos. 6-A, 34-A, 35-A, 36-A, 37-A, 38-A, 39-A, 40-A, 42-A, 43-A, 44-A, 45-A, 46-A, 47-A, 48-A, 49-A, 67-A, 68-A, and 87-A.

I. C. C. Protestants' Exhibit A for identification.

I. C. C. Respondents' Exhibit A for identification.

I. C. C. Respondents' Exhibit B for identification.

I. C. C. Protestants' unnumbered Exhibit entitled "Comparative Statement showing rates and average short tariff route distances from Brazil-Clinton and Linton-Sullivan Districts" etc.

I. C. C. Protestants' unnumbered Exhibit entitled "Exception".

I. C. C. Respondents' unnumbered Exhibit consisting of letter from L. P. Day to Secretary McGinty of Interstate Commerce Commission.

With the above exceptions the entire record now on file shall be printed in the customary manner.

Of the exhibits so omitted from printing, counsel for appellants, shall, before the cause comes up for argument in the Supreme Court, furnish to the Clerk 10 copies of the following exhibits introduced before the Interstate Com-
[fol. 805-88] merce Commission and constituting a part of Petitioners' Exhibit No. 9 before the District Court, which shall be suitably bound for submission to the Justices of the Court, and which shall have the same force and effect and be treated for all purposes as if they were a part of the printed transcript of the record, to-wit:

I. C. C. Exhibits Nos. 1 to 128, inclusive,
130 to 247, inclusive,
250 to 254, inclusive,
266 to 308, inclusive,
326 to 357, inclusive,
368 to 410, inclusive,
412 to 421, inclusive,

including Exhibits Nos. 6-A, 34-A, 35-A, 36-A, 37-A, 38-A, 39-A, 40-A, 42-A, 43-A, 44-A, 45-A, 46-A, 47-A, 48-A, 49-A, 67-A, 68-A, 87-A.

I. C. C. Protestants' Exhibit No. A for identification.

I. C. C. Respondents' Exhibit No. A for identification.

I. C. C. Respondents' Exhibit No. B for identification.

I. C. C. Protestants' unnumbered Exhibit entitled "Comparative Statement showing Rates and Average Short Tariff Route Distances from Brazil-Clinton and Linton-Sullivan Districts" etc.

I. C. C. Respondents' unnumbered Exhibit consisting of letter from L. P. Day to Secretary McGinty of Interstate Commerce Commission.

It is further stipulated and agreed that counsel for any of the parties may in his brief or argument refer to any exhibit or portion thereof introduced in evidence before the Interstate Commerce Commission or in the District Court that is not included in the printed transcript of the record in this Court and not included in the aforesaid list of exhibits of which 10 copies shall be provided for the use of the Justices.

John W. Bricker, Attorney General of Ohio. Donald C. Power, Attorney for Public Utilities Com-
[fols. 805-89 & 89a] mission of Ohio. Clan Crawford, Andrew P. Martin, Attorneys for Wheeling and Lake Erie Railway Company. E. S. Ballard, Attorney for Other Appellants. H. Austin Hauxhurst, Attorney for Empire Sheet and Tin Plate Company. Elmer B. Collins, Attorney for United States of America. J. Stanley Payne, Attorney for Interstate Commerce Commission. John Fox Weiss, Attorney for Public Service Commission of the Commonwealth of Pennsylvania. Guernsey Orcutt, Attorney for Baltimore and Ohio Railroad Company and Other Intervening Railroads. August G. Gutheim, Attorney for Western Pennsylvania Coal Traffic Bureau and Various Intervening Coal Companies. Henry C. Hall, Alex. M. Bull, Attorneys for Consolidation Coal Company and Receivers Thereof.

[fol. 805-89b] [File endorsement omitted.]

[fol. 805-90] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 886

STATEMENT OF POINTS ON WHICH CROSS APPELLANTS INTEND TO RELY, AND STIPULATION OF PARTS OF THE RECORD NECESSARY TO BE PRINTED—Filed March 29, 1934

In support of their cross appeals, the United States, the Interstate Commerce Commission, the Public Service Commission of the Commonwealth of Pennsylvania, the Baltimore & Ohio Railroad Company et al., will rely upon the following point:

The specially-constituted District Court erred in staying for a period of sixty days from January 19, 1934, the order of the Interstate Commerce Commission entered May 2, 1933, in the proceeding entitled Docket No. 25566, Intrastate Rates on Bituminous Coal within Ohio.

The parts of the record, as filed in this Court, which need be printed by the Clerk are as follows:

[fol. 805-91] 1. Application by plaintiffs and intervening plaintiffs for stay pending appeal in No. 1039.

2. Affidavits of William Emery, Jr., and R. L. Ireland, Jr., in Nos. 1039 and 1040, filed with and as part of application referred to in paragraph No. 1 hereof.

(NOTE.—Application by plaintiffs and intervening plaintiffs for stay pending appeal in No. 1040 and affidavits of William Emery, Jr., and R. L. Ireland, Jr., filed as part thereof, may be omitted in printing and a note inserted in the record stating that the body of said application in No. 1040 and the affidavits filed therewith are identical with those in No. 1039.)

3. Answer of Interstate Commerce Commission to application for stay in No. 1039.

(NOTE.—Answer of Interstate Commerce Commission to application for stay in No. 1040, except for the heading, is identical with the answer in No. 1039 and may be omitted in printing and a note inserted that the answer is identical with that in No. 1039.)

4. Affidavit of Roy S. Kern dated January 12, 1934, in No. 1039.

(NOTE.—Affidavit of Roy S. Kern dated January 12, 1934, in No. 1040 is identical with his affidavit of the same date in No. 1039 and should be omitted in printing with a note to that effect.)

5. Affidavit of Roy S. Kern dated January 19, 1934, in No. 1039.

(NOTE.—Affidavit of Roy S. Kern dated January 19, 1934, in No. 1040 being identical with the affidavit of the same date in No. 1039 may be omitted in printing with the proper explanatory note.)

[fol. 805-92] 6. Affidavit of J. Noble Snider dated January 12, 1934, in Nos. 1039 and 1040 jointly.

7. Affidavit of Elmer Striebel dated January 12, 1934, in Nos. 1039 and 1040 jointly.

8. Affidavit of P. C. Sprague dated January 18, 1934, in Nos. 1039 and 1040 jointly.

9. Order dated January 19, 1934, granting 60-day stay in No. 1039.

(NOTE.—Order of January 19, 1934, granting 60-day stay in No. 1040 similar to order of the same date in No. 1039 and should be omitted in printing with an explanatory note.)

10. Petition of United States and others to The Associate Justice of the United States for allowance of appeal, on which was noted allowance of appeal by Associate Justice McReynolds.

11. Citations on (cross) appeal.

12. Assignment of errors on (cross) appeal.

13. Jurisdictional statement on (cross) appeal.

J. Crawford Biggs, Solicitor General. Elmer B. Collins, Special Assistant to the Attorney General. J. Stanley Payne, Solicitor for Interstate Commerce Commission. John Fox Weiss, Solicitor for Public Service Commission of the Commonwealth of Pennsylvania. Guernsey, Orcutt, Solicitor for Baltimore & Ohio Railroad Company and Other

Railroad Cross Appellants. August Gutheim, [fol. 805-93] Solicitor for Western Pennsylvania Coal Traffic Bureau and Others. Henry C. Hall, Alex. M. Bull, Solicitor- for Consolidation Coal Company and Receivers Thereof.

Service of the foregoing statement of points, and designation of parts of record to be printed, and receipt of a copy thereof are hereby admitted and acknowledged.

John W. Bricker, Donald C. Power, Clan Crawford, Andrew P. Martin, E. S. Ballard, H. Austin Hauxhurst, Attorneys for Cross-Appellees.

[fol. 805-94] Stipulation as to Printing Record

It is stipulated by the parties hereto that the following shall govern the printing of the record of the District Court in the cross appeal in the above-entitled cause.

Print the entire record on cross appeal except the following:

Omit the application by plaintiffs and intervening plaintiffs for stay pending appeal in No. 1040 and affidavits of William Emery, Jr., and R. L. Ireland, Jr., filed as part thereof, and, at the proper place in the record insert a note that the body of said application in No. 1040 and affidavits filed therewith are identical with those in No. 1039.

[fol. 805-95] Omit the answer of Interstate Commerce Commission to application for stay in No. 1040, and, at the proper place insert a note to the effect that the body of the answer in No. 1040 is identical with that in No. 1039.

Omit the affidavit of Roy S. Kern dated January 12, 1934, in No. 1040, and, insert a note to the effect that said affidavit is identical with his affidavit of the same date in No. 1039.

Omit affidavit of Roy S. Kern dated January 19, 1934, in No. 1040, and, insert a note to the effect that it is identical with affidavit of the same date in No. 1039.

Omit order of January 19, 1934, granting 60-day stay in No. 1040, and, at the proper place in the record insert a note to the effect that it is the same as the order of the same date in No. 1039.

J. Crawford Biggs, Solicitor General. Elmer B. Collins, J. Stanley Payne, John Fox Weiss, Guernsey Orcutt, August Gutheim, Henry C. Hall, Alex. M.

Bull, Solicitors for Cross-Appellants. John W. Bricker, Donald C. Power, Clan Crawford, Andrew [fol. 805-96] P. Martin, E. S. Ballard, H. Austin Hauxhurst, Solicitors for Cross-Appellees.

[fol. 805-97] [File endorsement omitted.]

[fol. 806] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

In Equity. No. 1039

STATE OF OHIO and PUBLIC UTILITIES COMMISSION OF OHIO, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

In Equity. No. 1040

THE WHEELING & LAKE ERIE RAILWAY COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

Statement of the Evidence—Filed March 15, 1934

These causes came on for hearing on June 3, 1933, before the late Circuit Judge Hickenlooper and District Judges Hough and Nevin. The State of Ohio and the Public Utilities Commission of Ohio, petitioners in No. 1039, were represented by John W. Bricker, Attorney General of Ohio, and Thomas J. Herbert, Assistant Attorney General of Ohio; the Wheeling & Lake Erie Railway Company, petitioner in No. 1040, by Clan Crawford; the Eastern Ohio Coal Operators Association and other intervening plaintiffs, by Ernest S. Ballard; the United States by Elmer B. Collins, Special Assistant to the Attorney General; the Interstate Commerce Commission by J. Stanley Payne, its Assistant

Chief Counsel; the Public Service Commission of the Com-
[fol. 807] monwealth of Pennsylvania, intervening defendant, by John Fox Weiss, its Attorney; the Baltimore and Ohio Railroad Company and other intervening railroad companies, intervening defendants, by Charles R. Webber, Guernsey Orcutt, Leo P. Day and M. Carter Hall; the Western Pennsylvania Coal Traffic Bureau and various coal companies, intervening defendants, by August G. Gutheim; Robert C. Hill and Howell Fisher, Domiciliary Receivers of the Consolidation Coal Company, and Robert C. Hill and William H. Koch, Ancillary Receivers of the Consolidation Coal Company, and the Consolidation Coal Company, intervening defendants, by Henry C. Hall and Alex M. Bull.

Stipulation re Transcript of Evidence and Exhibits Before I. C. C.

It was stipulated and agreed by and between counsel for all parties that the transcript of the evidence and the exhibits offered before the Interstate Commerce Commission might be received not only as evidence of what happened at the hearings before the Commission, but as evidence of the extrinsic fact to whatever extent it might be relevant to the issues made in this case, this stipulation to apply in both No. 1039 and No. 1040.

It was also stipulated by and between counsel for all parties that these cases should be submitted at this time on final hearing, and the cases were so submitted.

Offers in Evidence

There were offered and received in evidence petitioners' Exhibits 1 to 9, inclusive, which were as follows:

Exhibit No. 1. Certified copies of certain petitions and orders in the proceeding before the Interstate Commerce Commission styled Docket No. 25566, Intrastate Rates on Bituminous Coal within the State of Ohio.

[fol. 808] Exhibit No. 2. Certified copy of the record before the Interstate Commerce Commission in Investigation and Suspension Docket No. 3801, Coal From Pennsylvania to Northern Ohio, as the same was on file and of record in the office of the Interstate Commerce Commission on December 4, 1932.

Exhibit No. 3. Certified copy of the record before the Interstate Commerce Commission in Investigation and Suspension Docket No. 3833, Coal from Pennsylvania to Northern Ohio (2), as the same was on file and of record in the office of the Interstate Commerce Commission on December 4, 1932.

Exhibit No. 4. Certified copy of the record before the Interstate Commerce Commission in the proceeding styled Docket No. 25590, Western Pennsylvania Coal Traffic Bureau, et al. v. The Akron, Canton & Youngstown Railway Company, et al., as the same was on file and of record in the office of the Interstate Commerce Commission on December 4, 1932.

Exhibit No. 5. Certified copy of the record before the Interstate Commerce Commission in the proceeding styled Docket No. 25656, H. W. Showalter, Receiver, Continental Coal Company, et al. v. Akron, Canton & Youngstown Railway Company, et al., as the same was on file and of record in the office of the Interstate Commerce Commission on December 4, 1932.

Exhibit No. 6. Certified copy of the record before the Interstate Commerce Commission in the proceeding styled Docket No. 25657, Property Owners' Committee, et al. v. Akron, Canton & Youngstown Railway Company, et al., as the same was on file and of record in the office of the Interstate Commerce Commission on December 4, 1932.

[fol. 809] Exhibit No. 7. Certified copy of the record before the Interstate Commerce Commission in the proceeding styled Docket No. 25670, The Consolidation Coal Company, et al. v. Akron, Canton & Youngstown Railway Company, et al., as the same was on file and of record in the office of the Interstate Commerce Commission on December 4, 1932.

Exhibit No. 8. Certified copy of the record and transcript of the testimony before the Interstate Commerce Commission in the proceeding styled Docket No. 25885, Surcharge on Bituminous Coal within the State of Ohio.

Exhibit No. 9. Certified copy of transcript of the testimony introduced before the Interstate Commerce Commission in the proceedings styled Docket No. 25566, Intrastate Rates on Bituminous Coal within the State of Ohio; Investigation and Suspension Docket No. 3801, Coal from Pennsylvania to Northern Ohio; Investigation and Suspension

Docket No. 3833, Coal from Pennsylvania to Northern Ohio (2); Docket No. 25590, Western Pennsylvania Coal Traffic Bureau, et al. v. Akron, Canton & Youngstown Railway Company, et al.; Docket No. 25656, H. W. Showalter, Receiver, Continental Coal Company, et al. v. Akron, Canton & Youngstown Railway Company et al.; Docket No. 25657, Property Owners' Committee, et al. v. Akron, Canton & Youngstown Railway Company et al.; and Docket No. 25670, Robert C. Hill, Frank R. Lyon and Howell Fisher, Domiciliary Receivers of the Consolidation Coal Company, et al. v. Akron, Canton & Youngstown Railway Company, et al.; and also of exhibits filed at said hearings, numbered 1 to 421, inclusive, and 3 unnumbered exhibits filed subsequently to said hearings, together with Protestants' Exhibit A for identification, and Respondents' Exhibits A and [fol. 810] B for identification; also four (4) verified statements of evidence filed subsequently to the hearings; also report and orders of the Interstate Commerce Commission filed and entered May 2, 1933, and corrected orders of the Interstate Commerce Commission entered May 2, 1933, in the aforesaid proceedings.

There were offered and received in evidence the following affidavits: affidavit by Roy S. Kern, dated June 3, 1933, submitted in behalf of the intervening railroad defendants; affidavit of J. Noble Snider, dated June 2, 1933, submitted in behalf of the receivers of the Consolidation Coal Company; affidavit by Elmer Striebel, dated June —, 1933, submitted in behalf of the Western Pennsylvania Coal Traffic Bureau.

The following is a condensed statement in narrative form of the testimony introduced before the Interstate Commerce Commission in said Docket No. 25566, Investigation and Suspension Docket No. 3801, Investigation and Suspension Docket No. 3833, Docket No. 25590, Docket No. 25656, Docket No. 25657, and Docket No. 25670, and the verified statements filed subsequently to the hearing in lieu of oral testimony:

[fol. 811] **Narrative of the Evidence Before the Interstate Commerce Commission**

Rates on Bituminous Coal within the State of Ohio, Docket 25566.

Coal from Pennsylvania to Northern Ohio, I. & S. Docket 3801.

Coal from Pennsylvania to Northern Ohio (2), I. & S. Docket 3833.

Western Pennsylvania Coal Traffic Bureau, et al., Complainants, v. The Akron, Canton & Youngstown Railway Company, et al., Defendants, Docket 25590.

Continental Coal Company, et al., Complainants, v. The Akron, Canton & Youngstown Railway Company, et al., Defendants, Docket 25656.

Property Owners' Committee, et al., Complainants, v. The Akron, Canton & Youngstown Railway Company, et al., Defendants, Docket 25657.

Frank C. Hill, Frank R. Lyon, and Howell Fisher, domiciliary receivers of the Consolidation Coal Company, et al., Complainants, v. The Akron, Canton and Youngstown Railway Company, et al., Defendants, Docket 25670.

Columbus, Ohio, December 12, 1932.

Before R. N. Trezise, Examiner

APPEARANCES OF COUNSEL

Guernsey Orcutt, appearing for Respondents and Defendants, except W. & L. E., A. C. & Y. and P. & W. Va.

D. Lynch Younger, appearing for Norfolk & Western Railway Co.

[fol. 812] Leo. P. Day, appearing for New York Central Lines.

M. Carter Hall, appearing for Chesapeake & Ohio Railway Co.

Charles R. Webber, appearing for The Baltimore & Ohio R. R. Co., and other respondents and defendants.

Andrew P. Martin, appearing for Wheeling & Lake Erie Ry. Co., Lorain & West Virginia Ry. Co., and Akron, Canton & Youngstown Ry. Co.

W. S. Bronson, and R. W. Paisley, appearing for Pittsburgh & West Virginia Railway Company.

F. M. Garland, appearing for Huntingdon & Broad Top Mountain R. R. & Coal Co.

T. H. Fee, appearing for Western Maryland Ry. Co.

John B. Keeler and A. A. Mattson, appearing for complainants and intervenors in Docket 25656.

E. J. McVann, appearing for Property Owners Committee, Docket 25657.

Beecher Waltermire and D. H. Armstrong, appearing for N. Y. Coal Co., Sunday Creek Coal Co., Ohio Mining Co., Ohio Collieries Co., and Black Diamond Coal Co.

Ernest Ballard, and D. F. Hurd, appearing for Eastern Ohio Coal Operators Association, Akron Chamber of Commerce, et al., Intervenors.

August G. Gutheim, A. S. Boden, and W. P. Buffington, appearing for Western Pennsylvania Coal Traffic Bureau.

Walter A. Jones, appearing for Central Pennsylvania Coal Producer's Ass'n.

Henry C. Hall and Alex M. Bull, appearing for Robert C. Hill, et al., Receivers for Consolidation Coal Co.

[fol. 813] Curtis Reed, appearing for intervenors in Ohio Case #8097, Coal Shippers in Pomeroy District.

J. F. Graves, appearing for Receivers of The Consolidation Coal Co.

A. B. McElvany, appearing for Rochester & Pittsburgh Coal Co.

James W. Huffman, appearing for The Cambridge Collieries Co., and The Akron Coal Company.

John G. Hoffstot, appearing for Lincoln Gas Coal Co.

J. C. Argetsinger, appearing for The Youngstown Sheet & Tube Company.

W. H. Welsh and A. C. Graham, appearing for The Youngstown Sheet & Tube Company.

H. C. Young, appearing for Cleveland Worsted Mills Co. of Cleveland.

John L. Rogerson, Jr., appearing for self.

C. F. Krone, appearing for W. J. Rainey, Inc.

W. K. Bromley, appearing for Pickands Mather & Co.

T. H. Burgess, H. D. Rhodehouse and R. A. Eldridge, appearing for Republic Steel Corporation.

H. J. Carroll, appearing for The Goodyear Tire & Rubber Co., The Wheeling Township Coal Mining Co.

W. J. McCauley, appearing for Goodyear Tire & Rubber Co.

H. J. Zimmerman, appearing for the B. F. Goodrich Co., Akron, Ohio.

H. D. Fenske, appearing for Great Lakes Steel Corp.

Wm. B. Faulkner, appearing for Donner-Hanna Coke Corp.

H. A. Hauxhurst, appearing for Empire Steel Company.
[fol. 814] J. P. Hannan, appearing for The Corrigan, McKinney Steel Co.
W. M. Lorenz, appearing for Otis Steel Company.
C. F. McBride, appearing for Sharon Steel Hoop Co.
G. H. Staat, appearing for Interlake Iron Corp'n.
G. A. Swineford, appearing for C. H. Henkel, Receiver, Empire Steel Corp.
W. R. Hubbard, appearing for Akron Chamber of Commerce.
Andrew H. Brown, appearing for The Cleveland Chamber of Commerce.
Clare B. Tefft, appearing for The Toledo Chamber of Commerce.
J. G. Young, appearing for The Columbus Chamber of Commerce.
Henry L. Goemann, appearing for Mansfield Chamber of Commerce.
J. W. Herrold, appearing for The Public Utilities Commission of Ohio.
E. J. Hopple, appearing for The Public Utilities Commission of Ohio.
Charles Reitell, appearing for Public Service Commission, Commonwealth of Pennsylvania.
P. E. Fickenscher, appearing for Public Service Commission of Pennsylvania.
Fred M. Renshaw, appearing for Niagara Frontier Industrial Traffic League and Chamber of Commerce.

Testimony Taken at Columbus, Ohio, December 12, 1932

Roy S. Kern was called as a witness, and having been duly sworn, testified as follows:

Direct examination.

By Mr. Orcutt:

[fol. 815] (61) * I am Chairman of The Coal, Coke & Iron Ore Committee of the Central Freight Association

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* References are to page numbers of the Official Stenographers' Minutes.

Territory, with headquarters at 836 Wabash Building, Pittsburgh, Pa. (62) The Coal, Coke & Iron Ore Committee is a carrier-maintained organization which deals with rates, rules and regulations governing bituminous and anthracite coal, coke and iron ore within Central Freight Association Territory and from and to it. I have been Chairman of that Committee since December 1, 1926. Prior to that time, for about twelve years, I was in the employ of The New York Central Railroad at Cleveland in the Coal and Ore Department.

The rates on bituminous coal from origins in Ohio to destinations in Ohio and from origins outside the state of Ohio to destinations within the state of Ohio come exclusively within the jurisdiction of The Coal, Coke & Ore Committee [fol. 816] of which I speak. In presenting my testimony here I speak for all respondents in Docket 2556 with the exception of The Wheeling & Lake Erie, The Lorain & West Virginia, The Akron, Canton & Youngstown, and The Pittsburgh & West Virginia. I was appointed by the executives as Chairman of the Traffic Committee (63) having charge of this case and asked to act as witness for all of the carrier respondents with the exception of those named.

My testimony now will be particularly directed to I.C.C. Docket 25566, which is the investigation initiated by the Interstate Commerce Commission at the instance of the Central Freight Association carriers into the lawfulness under Sections 3 and 13 of the Transportation Act of certain reduced rates on bituminous coal for intrastate movements from coal producing districts in Ohio to territory in that state which has been termed northeastern Ohio and includes such important communities as Cleveland, Huron, Lorain, Akron, Canton, Massillon, Alliance, Mansfield and intermediate points. These intrastate reductions were in all instances the result of orders of the Public Service Commission of Ohio, either mandatory or permissive.

Before beginning to explain those orders of the Public Utilities Commission of Ohio, I want to state that I am about to introduce as exhibits the various orders of the Ohio Commission and their decisions, but it was impossible [fol. 817] for me to obtain more than five copies from the Ohio Commission, consequently I won't be able to distribute them as fully as other exhibits. However, they are

merely copies of the Ohio Commission's orders (64) which I believe everybody has, anyway.

Another preliminary in connection with my exhibits is the fact that same of them are marked in the heading, "I&S 3801," some bear Docket 25566, and I hope nobody will pay any particular attention to those references because those exhibits are a sort of development of the various cases that have come up in the last two months, and some of them haven't got the proper style.

Now with respect to these orders, the first was the decision and order of the Public Utilities Commission of Ohio in Docket 7252, Republic Steel Corporation vs. Baltimore & Ohio Railroad Company, dated June 30, 1932. I desire to introduce a copy of the decision and the order in those proceedings as my Exhibit No. 1.

Exam. Trezise: It will be understood that throughout this hearing the exhibits, when referred to and properly identified, will be received without formal offering unless they are later rejected.

Respondents' Exhibit No. 1, Witness Kern, received in evidence.

[fol. 818] The Witness: The order, it will be noted, required that effective August 1, 1932, upon not less than three days' notice to the Commission and the general public, rates on bituminous coal from Brewster, Massillon City No. 8 mine, Ohio, in the Massillon district on the Wheeling & Lake Erie Railway be reduced to 60 cents net (65) ton to Massillon and 72 cents net ton to Canton. Theretofore the rate from this mine to Massillon was 64 cents and to Canton $1.01. From North Industry, Black Oak Mine No. 2 in the Middle District on the Baltimore & Ohio Railroad it required a rate of 60 cents per net ton to Canton and 80 cents per net ton to Massillon, the rates theretofore in effect being 76 cents to Canton and $1.01 per net ton to Massillon. From all mines and shipping points in the Massillon and Middle Coshocton District, except Brewster and North Industry, it required 80 cents per net ton to Canton and Massillon, the rate therefofore being $1.01, and from all mines and shipping points in the Ohio No. 8 District, $1.08 to Canton and Massillon, Ohio, the previous rate being $1.26. The carriers' defendants in Docket 7252 other than the

Wheeling & Lake Erie, believing that the decision and order was contrary to the weight of the evidence and otherwise unlawful, petitioned the Ohio Commission for re-opening, [fol. 819] reconsideration and rehearing of the case. This the Commission promptly denied, whereupon such carriers' defendants instituted proceedings in error in the Supreme Court of Ohio. As a result of the refusal of the Commission to re-open the case and of the Supreme Court of Ohio to grant a stay of the order, it was necessary for defendants, against their wishes, to comply with the order effective August 1, 1932.

The Wheeling & Lake Erie Railway decided in the first instance to comply with the order, (66) but before publishing the reduced rates filed with the Public Service Commission an application dated July 20, 1932 for permission to establish on one day's notice reduced rates on bituminous coal from mines and origins in its No. 8, Middle Coshocton and Massillon Districts to various destinations on its lines as well as those of the Lorain & West Virginia Railway and the Akron, Canton & Youngstown Railway, namely, Cleveland, Huron, Lorain, Akron, Ohio and destinations intermediate thereto. A copy of the application of The Wheeling & Lake Erie, bearing No. 129 and signed by Mr. H. A. Eberhart, Assistant General Freight Agent, Wheeling & Lake Erie and Lorain & West Virginia, together with a copy of the Public Service Commission of Ohio's Special Permission 6492 of July 20, 1932, granting such application, I desire to introduce as my Exhibit No. 2.

[fol. 820] (Respondents' Exhibit No. 2, Witness Kern, received in evidence.)

It is to be observed that the application states: "The proposed rates represent reductions and are filed for the purpose of giving to localities on the Akron, Canton & Youngstown Railway, The Wheeling & Lake Erie Railway, and The Lorain & West Virginia Railway, that are in competition industrially with Massillon and Canton, Ohio, rates which are on substantially the basis as those prescribed by the Commission in Docket 7252." The order of (67) the Commission states in part: "That the proposed reduced rates will be substantially on the same basis as those prescribed by the Commission in Docket 7252 on bituminous

coal in carload lots from mines and coal shipping points in the Ohio No. 8 and Middle-Coshocton Districts to Canton and Massillon, Ohio." The exhibit attached to the Wheeling & Lake Erie Railway and Lorain & West Virginia Railway application sets forth the rates proposed, the important among which are those to Cleveland, Ohio of $1.45, from No. 8; $1.22 from Middle; and $1.08 from Massillon, to which the then existing rates were $1.74, $1.54 and $1.54, respectively; to Huron of $1.55 from No. 8, $1.34 from [fol. 821] Middle, and $1.15 from Massillon, to which the existing rates were $1.74, $1.64 and $1.59 respectively; to Lorain and South Lorain, Ohio of $1.45, $1.28 and $1.08, to which the existing rates were $1.74, $1.54 and $1.54 respectively; to Akron, Ohio of $1.28 from No. 8, $1.01 from Middle and 87 cents from Massillon, the then existing rates having been $1.51, $1.26 and $1.26, respectively. These rates will be re-stated in exhibits which I expect to introduce in the course of my testimony.

When the other carriers serving the Massillon, Middle-Coshocton and No. 8 Districts of Eastern Ohio learned of the application of The Wheeling & Lake Erie Railway to reduce their rates to this important territory in Northeastern Ohio, they first held a conference at Cleveland, Ohio on July 26th (68).

Representatives of the Baltimore & Ohio, New York Central, Pennsylvania, and Pittsburgh & West Virginia roads, and myself, attended that conference. I was authorized to and did write the Chairman of the Public Utilities Commission of Ohio, Mr. E. J. Hopple, asking that the Commission suspend the tariff of the Wheeling & Lake Erie Railway naming the proposed reduction. Chairman Hopple re-[fol. 822] sponded to my letter with one dated July 27th and declined the request. I desire to introduce mimeographed copy of my letter to Chairman Hopple, dated July 26, 1932, and his reply of July 27th as Exhibit No. 3.

(Respondents' Exhibit No. 3, Witness Kern, received in evidence.)

After the Commission had refused to suspend and investigate the reduced rates proposed by The Wheeling & Lake Erie Railway, other carriers pursued the matter further. They immediately filed with the Supreme Court of Ohio a petition in error and also an application for a stay

of the order pending disposition of the proceedings in error in the court. The Court denied the application and accordingly the rates went into effect on August 1, 1932, as published.

The next order of the Ohio Commission was the order made on application of The Pittsburgh & West Virginia Railway (69) to publish from mines in its Ohio No. 8 District rates to meet the reductions of The Wheeling & Lake Erie Railway. This order was No. 6524 of August 5, 1932 [fol. 823] and under it the Pittsburgh & West Virginia Railway reductions were put into effect on August 12, 1932.

The Baltimore & Ohio Railroad, New York Central Railroad and Pennsylvania Railroad, whose lines also serve the so-called Eastern Ohio Districts, The Baltimore & Ohio serving the Massillon, Middle and No. 8 Districts, the New York Central Railroad, the Middle and No. 8 Districts, and The Pennsylvania Railroad, the Massillon, Middle-Coshocton and No. 8 Districts met the reductions to Cleveland, Huron, Lorain, Akron, Ohio and intermediate points as instituted by The Wheeling & Lake Erie Railway with the consent of the Public Utilities Commission of Ohio, and followed by The Pittsburgh & West Virginia Railway with the consent of the Public Utilities Commission of Ohio.

The Baltimore & Ohio Railroad, The New York Central Railroad and The Pennsylvania Railroad did not reach this conclusion until after having given the matter most careful consideration, because they realized that it was not the proper basis of rates to apply and further would instantaneously bring about demands for reductions in interstate rates to the destinations involved, not only because of (69a) the differential relationships which certain interstate rates [fol. 824] have for many years borne to the Ohio intrastate rates, but also because the competitive opportunity of interstate shippers would be adversely affected, and consequently it appeared probable that interstate shippers would lose business at these important markets to producers of coal in Eastern Ohio. However, the potential production of coal on The Wheeling & Lake Erie Railway in Eastern Ohio, augmented by that of mines on the Pittsburgh & West Virginia Railway, made it appear that unless the reduced rates were met The Baltimore & Ohio, Pennsylvania and New York Central roads would enjoy but little, if any, of the movement of coal from Eastern Ohio origins to the

destinations in Northeastern Ohio, and they at the same time would run the chance of having their interstate business from bituminous coal producing districts outside the State of Ohio reduced.

Moreover, several of the large mining operations in the No. 8 District are served jointly by either The Baltimore & Ohio Railroad or Pennsylvania Railroad and The Wheeling & Lake Erie Railway, and coincidentally with The Wheeling & Lake Erie Railway reduction the movement of coal from such mine to the affected destinations went via The Wheeling & Lake Erie Railway. The mines in the No. [fol. 825] 8 District served jointly by The Pennsylvania Railroad and Wheeling & Lake Erie Railway are Dorothy and Bud of the Youghiogheny & Ohio Coal Company situated at Rayland, Ohio. These operations, according to the 1933 issue of Mac's Coal Directory, (70) have a combined daily potential capacity of 3,250 tons. The Baltimore & Ohio Railroad and Wheeling & Lake Erie Railway jointly serve Pursglove Mine No. 10, with a daily potential capacity of 3,000 tons. For some time prior to the reductions of The Wheeling & Lake Erie Railway effective August 1, 1932 this mine was idle, but shortly after that time operation was resumed and it has been producing upwards of 1,500 tons per day since.

The New York Central Railroad serves no mines jointly with The Wheeling & Lake Erie Railway, but it has a situation which is analogous. The Dillonvale & Smithfield Railroad, which connects with The New York Central Railroad at Dillonvale, Ohio, serves two large operations—Crow Hollow Mine No. 1 at Bradley, Ohio and Crow Hollow Mine No. 2 at Smithfield, Ohio, with a combined daily capacity of 4,000 tons. The Dillonvale & Smithfield Railroad is operated by The New York Central Railroad under an agreement with the owner, The United States Coal Company, which also owns the coal mines I have men- [fol. 826] tioned. The Dillonvale & Smithfield Railroad also connects with The Wheeling & Lake Erie Railway, and at one time that railroad, through an operating agreement, had access to the mines on The Dillonvale & Smithfield Railroad. Shortly after The Wheeling & Lake Erie Railway reductions went into effect, the owners of The Dillonvale & Smithfield Railroad served notice that unless The New York Central Railroad met the reduced rates

of The Wheeling & Lake Erie Railway they would terminate their contract and enter into an arrangement (71) with The Wheeling & Lake Erie Railway, which would give their operations the benefit of the lower rates via that line. In view of these circumstances The Baltimore & Ohio, New York Central and Pennsylvania Railroads decided, as I have previously stated, to meet the Wheeling & Lake Erie Railway reductions, and I was directed to arrange to obtain the necessary authority from the Public Utilities Commission of Ohio.

My next Exhibit, No. 4, is a copy of the application dated August 25, 1932, filed with the Public Utilities Commission of Ohio by Mr. F. V. Davis, Publisher of the Coal Tariff bearing I. C. C. No. 48 and Ohio No. 48. It and the appended exhibit "A" explain in detail the adjustment then made, and it does not appear necessary for [fol. 827] me to go into the detail thereof at this time.

(Respondents' Exhibit No. 4, Witness Kern, received in evidence.)

I do, however, desire to emphasize the second to the last paragraph of the application, reading: "In this application your petitioners seek only to establish reduced rates which will accord their coal producers and themselves the parity in rates to the important markets existing at the cities herein specifically named and points intermediate thereto which existed prior to the aforementioned disruption;" also the next to last paragraph, reading in part: "In submitting this application your petitioners do emphatically state that the sole basis therefor is their desire to meet in their own behalf and in behalf of producers of coal (72) on their lines the existing competitive situation, and that they are of the considered opinion that the rates prescribed by your Commission in the aforementioned case, Ohio Public Utilities Commission Docket 7252, to which those herein proposed are apparently related, were not sustained by the law and the facts of record in such proceeding, and that the rates herein proposed for publication are in their judgment ex- [fol. 828] tremely low. The competitive conditions prompting this application are such that in the opinion of your

petitioners the reductions proposed should be made with utmost expediency."

The position of those carriers in this regard has not since undergone any change. The Ohio Commission did not immediately act upon this application, but on protests of various coal operators on the applicants' lines in districts in Ohio other than the Massillon, Middle-Coshocton and No. 8, notably The Cambridge, Crooksville and Hocking Districts, assign the same for hearing at Columbus on August 30, 1932. At this hearing representatives of the Eastern Ohio coal operators favored the reductions, whereas representatives of The Cambridge, Crooksville and Hocking Districts objected to them, claiming they would unduly prefer the shippers of coal in Eastern Ohio and prejudice them. They said that their objections would be withdrawn if the carriers would agree to make similar reductions in their rates to the same points of destination, but the carriers declined to do this. Following such hearing and notwithstanding the protests of Cambridge (73), Crooksville and Hocking District shippers, the Commission granted the carriers' application and issued Special [fol. 829] Permission Order No. 6570 of August 30, 1932. Under authority of this order the carriers effected the reductions on September 2, 1932.

I have mentioned the protests of The Cambridge, Crooksville and Hocking District operators against the Eastern Ohio coal reduction. Those operators, after the Commission had permitted the reduction in rates from Eastern Ohio, apparently applied to the Commission informally for affirmative relief in the shape of reductions in their rates equal to the reductions made from the Eastern Ohio Districts, particularly the No. 8 District, which is from a tonnage standpoint the most important of that group of districts. In any event, the Public Utilities Commission of Ohio on September 2, 1932, the day upon which the Eastern Ohio reductions of The Baltimore & Ohio, New York Central and Pennsylvania roads went into effect, served upon The Baltimore & Ohio Railroad, Pennsylvania Railroad, New York Central Railroad, Wheeling & Lake Erie Railway and Pittsburgh & West Virginia Railway an order in Docket 8072 stating that the Commission, believing that the failure, neglect and or refusal of the railroads stated to reduce their rates from The Cambridge, Crooksville &

Hocking District to Cleveland, Lorain, Huron, Akron, Orrville, Rocky River, Ohio and points intermediate thereto [fol. 830] to the same or substantially the (74) same as the rates from the Middle and No. 8 Districts to such destinations were reduced, unduly prefer the shippers and producers of coal in said Middle and No. 8 Districts and unjustly, unduly and unlawfully discriminate against the shippers and producers of coal in said Cambridge, Crooksville & Hocking Districts.

The order further cited the carriers therein named to appear at the offices of the Commission in the State Office Building, Columbus, Ohio, on Tuesday, September 13, 1932 at 9:30 o'clock, A. M. eastern standard time, to answer the aforesaid complaint and to show cause, if any there be, why their rates for the transportation of coal from The Cambridge, Crooksville & Hocking District should not be established upon the same or subtsantially the same basis as the rates the said respondents are now maintaining from points of origin in the Middle and No. 8 Districts to the destinations I have previously indicated.

The order of the Commission in Docket 8072, dated September 15, as amended on September 17, 1932, required that the rates from The Cambridge, Crooksville & Hocking Districts be reduced, effective September 29, 1932, to the destinations in Northeastern Ohio referred to, by the same amount as rates from the No. 8 District to the same [fol. 831] destinations had been previously decreased. The carrier respondents immediately asked the Commission for a re-hearing of the proceedings, which was denied by an order dated September 21st, whereupon the matter was taken to the Supreme Court of Ohio on a petition in error and an unsuccessful attempt (75) was made to have the order stayed. The rates were actually published effective September 29 and remain in effect. A copy of the Commission's order of September 2nd instituting the proceeding in Docket 8072, as well as other orders I have referred to in the same docket, I introduce as my Exhibit No. 5.

(Respondents' Exhibit No. 5, Witness Kern, received in evidence.)

On September 22nd, 1932, the Ohio Commission issued an order in Docket 8097 which set forth that the Commission having cause to believe that the failure, neglect and/or

refusal by said carriers to make reductions in the rates from the Pomeroy District of Ohio to Cleveland, Lorain, Huron, Akron, Orrville, Rocky River, Ohio and points intermediate thereto, the same or substantially the same as the reductions made in the rates from the Middle and No. 8 Districts, which I have previously explained, unjustly, unduly and unlawfully discriminates against the shippers [fol. 832] and producers of coal in said Pomeroy District, and unduly prefers the shippers and producers of coal in said Middle and No. 8 Districts. It cited the carriers to appear before the Commission at Columbus, Ohio on October 6, subsequently changed to October 14th, and show cause why their rates from Pomeroy District to the destinations I have indicated should not be reduced the same or substantially the same basis as rates then in effect from the Middle and No. 8 (76) Districts to the same destinations.

Following the hearings the Commission issued its findings and order in Docket 8097, dated October 18, which required the New York Central Railroad to reduce rates from its Pomeroy District to the destinations in Northeastern Ohio involved by the same amount in cents per ton as it had previously reduced its rates from the No. 8 District. These reductions were published effective, in accordance with the Commission's order, on October 28, 1932.

I submit as my Exhibit No. 6 the findings and orders of the Public Utilities Commission of Ohio in its Docket 8097.

(Respondents' Exhibit No. 6, Witness Kern, received in evidence.)

[fol. 833] Q. In the findings and orders of the Commission in Dockets 8072 and 8097, did the Commission indicate routes via which the reduced rates should apply?

Mr. Ballard: Mr. Orcutt, may I interrupt there? I have been handed a copy of what purports to be Exhibit No. 6. It consists of copies of two orders. The first is the order of investigation and the second is the order setting the hearing.

The Witness: I was just going to explain that, Mr. Ballard. I have just noted that, too. There should have been also attached to that the order of the Commission of October 18, and I shall make good that deficiency in the exhibit before I leave the stand. That is in our petition. (77) The findings and final order are in our petition.

In the findings and orders of the Commission in dockets known as 8072 and 8097, that is, The Public Utilities Commission of Ohio, the Commission indicated the routes via which the reduced rates would apply. The orders in these cases state that the reduced rates from the Hocking, Crooksville and Pomeroy Districts should be established only via available routes through non-affected territory. If that limitation had not been placed upon the routing, the effect of the Ohio Commission's order would have been to reduce the rates which came about under the decision (79) and [fol. 834] order of the Interstate Commerce Commission in the Ohio-Michigan Coal Cases, 80 I. C. C. 663. In so reducing those rates they would have violated that order.

In so far as the order pertaining to this particular phase of my testimony is concerned, it fixed a rate of $1.89 from the Southern Ohio Districts to the Toledo rate group of affected territory. That automatically fixed the rate to Cleveland at $1.89 and had the Ohio Commission required reductions in the rate to Cleveland via routes which extend through the Toledo rate group, of which there are many, it would have necessitated, under the long and short haul provision of Sections 504-1 of the Ohio General Code reductions to intermediate destinations within affected territory.

That decision fixed relationships as between the basic Southern Ohio Districts and the Inner and Outer Crescents throughout the entire affected territory, which I will explain later. Southern Ohio, as contemplated in the Ohio-Michigan Coal Cases (80), I believe were simply the Hocking and Pomeroy Districts.

The original order included the Jackson and the Crooksville Districts, all of those districts with the exception of No. 8 and Cambridge, but there was a subsequent correction to the order which excluded Crooksville and Jackson [fol. 835] County, thereby permitting the carriers to maintain their differential under Hocking into almost all affected territories, which came about largely as a result of previous decisions of the Interstate Commerce Commission. Personally I think the order ran to the rates from the Cambridge and No. 8 Districts into affected territory.

In connection with the last order of the Ohio Commission as to what would have happened had the Ohio Commission ordered reductions via all existing routes and what

that would have meant, I believe I stated before that there are many routes (81) from the Hocking and Pomeroy Districts to Cleveland, Akron, Lorain, and Huron which applied through affected territory. In fact, the routes previously handling all or practically all of the traffic extended through affected territory, and of course that would have meant automatic reduction into affected territory had the rate via those routes been reduced. It would have meant reductions by the same amount as the rate to Cleveland, they being in the Toledo group and Cleveland being the same today. Undoubtedly that in itself would have resulted in the disruption of the relationship fixed in the Ohio-Michigan Coal Cases to the Toledo group. There is a differential relationship between the Ohio districts and the [fol. 836] Inner and Outer Crescents. To the extent that the Ohio district does not pay the base rate, then that differential relationship is gone.

As to the decision and order of the Public Utilities Commission of Ohio in Docket 7036, the Empire Steel Corporation case, this was a case brought by the Empire Steel Corporation of Mansfield, Ohio against rates on coal from mines in the Cambridge District of Ohio on The Baltimore & Ohio Railroad to Mansfield. The New York Central Railroad and The Pennsylvania Railroad intervened in the case. Prior to the decision the rate of the Baltimore & Ohio Railroad from the Cambridge District to Mansfield, also (82) that of the Pennsylvania Railroad from mines served by it in the Cambridge District to Mansfield, was $1.76 per net ton. The Commission required that the rate be reduced by 25 cents per ton to $1.51 per ton, and in accordance with the terms of the order the Baltimore & Ohio Railroad effected the reduction on August 20, 1932. Shortly thereafter The Pennsylvania Railroad, for competitive reasons, met the reduced rate of The Baltimore & Ohio Railroad. In this connection I might add that the decision and order of the Ohio Commission were appealed to the Supreme Court of Ohio, where a stay was sought and denied. I de- [fol. 837] sire to offer as my Exhibit No. 7 a copy of the decision and order of the Public Utilities Commission of Ohio in this case.

(Respondents' Exhibit No. 7, Witness Kern, received in evidence.)

It is to be understood that all of the reduced rates I have mentioned as resulting from the several orders of the Public Utilities Commission of Ohio referred to are published to expire with August 1, 1933, except those resulting from the orders in Dockets 7252 and 7036, Republic Steel Corporation and Empire Steel Corporation cases. Tariffs naming all of the rates so ordered bear August 1, 1933 as the date of expiration, except the rates from Massillon, Middle-Coshocton and No. 8 Districts to Canton and Massillon as prescribed in Docket 7252, and from the Cambridge (83) District to Mansfield as prescribed in Docket 7036, which are not subject to an expiration date.

Q. Will you please describe historically the rate structure brought in issue in this proceeding and introduce such exhibits as you have prepared in connection therewith? I think, Mr. Examiner, we can introduce the series of exhibits in a set, so that all may have them as we go from one to the other and save the time of passing each one around. The exhibit appearing on top of this set we will offer as Exhibit No. 8.

[fol. 838] (Respondents' Exhibit No. 8, Witness Kern, received in evidence.)

By Mr. Orcutt:

Q. I will ask the witness to proceed to describe that exhibit.

A. Exhibit No. 8 is a copy of General Order No. 28, issued May 25, 1918 by W. G. McAdoo, Director General of Railroads. This order authorized a general increase, effective June 25, 1918, in all freight rates, passenger fares and baggage charges. I call attention to the bottom of page 1 of the exhibit attached to General Order 28, which in paragraph "A" of Section 2 provides a scale for increasing rates on coal. This scale of increases is subject to a note providing that where rates have not been increased since June 1, 1917 the increase to be made shall be determined by first adding to the present rate 15 cents per ton, net or gross as rated or if an increase of less than 15 cents per ton, net or gross as rated, has been made since that date, then by first adding to the (84) present rate the difference between the amount of that increase and 15 cents per ton, net or gross as rated, and

to the rates so constructed the increases were intended to be added; also that where rates from producing points or to destinations have been based on fixed differentials in cents per ton, such differentials it was intended should be main-[fol. 839] tained, the increase to be figured on the highest rated point or group in each adjustment.

Exhibit No. 9 is a copy of Supplement dated June 12, 1918 to General Order 28. This did not change the original order in so far as coal was concerned, but restated the scale of advances, as well as the rules governing the application of the same in instances where rates had not been increased since June 1, 1917 and where differential relationships were to be preserved.

(Respondents' Exhibit No. 9, Witness Kern, received in evidence.)

As Exhibit No. 10 I offer a copy of Freight Rate Authority No. 8277, (85) issued by Director Division of Traffic, United States Railroad Administration, Mr. Edward Chambers, on May 22, 1919, which requires a brief explanation.

(Respondents' Exhibit No. 10, Witness Kern, received in evidence.)

Notwithstanding the fact that General Order No. 28, as I have previously stated, authorized the preservation of recognized rate differentials, time prevented observance of such in the tariffs naming the initial increases effective June 25, 1918. The task of advancing rates so as to preserve differentials could not be done in the period of one month [fol. 840] between the issuance of General Order No. 28 and the effective date of the increased rates. Consequently the increases on bituminous coal throughout Central Freight Association territory generally and elsewhere were published in blanket supplements which merely applied the scale of increases to the individual rates. Thereafter the carriers began the work of checking rates which would restore the differentials necessarily disrupted through application of the General Order No. 28 Scale, but before publishing such it was necessary, under the requirements of the railroad administration, to secure authority of the Director Division of Traffic to effect the readjustment, hence, Freight Rate Authority No. 8277. Exhibit "A" attached to this

authority sets forth in some detail the method pursued in restoring the differentials. As applied to Eastern Ohio, including (86) the adjustment from Cambridge, No. 8, Middle and Massillon Districts to Northeastern Ohio destinations, also from the Pittsburgh and Connellsville districts of Western Pennsylvania and the Fairmont District of Northern West Virginia to the same destinations, the rates were adjusted by publishing specific rates to take the place of those named in the blanket supplements previously filed. These specific rates were not based on any one origin, but [fol. 841] were the result of agreement reached after numerous conferences between the representatives of interested shippers and consumers and the Railroad Administration. The differentials, however, as between these origin districts which had existed prior to the General Order 28 Blanket Supplement disturbance were restored.

By the term "fixed differentials" or "differentials", I mean differences which remain the same in amount regardless of the level of the rates. Differentials of this character are created or become fixed by long established practice, by initial design, or by order of competent authority. When I use the term "relationships" I will mean mere differences in rates.

My definition is the same as that which the Railroad Administration and carriers placed upon the term "fixed differentials" as contained in General Order No. 28 (87).

As my next exhibit, No. 11, I offer a copy of the testimony and exhibits of witness T. B. Crosley in Ex Parte No. 74, which sets forth the plan of the carriers for advancing coal rates in that proceeding.

(Respondents' Exhibit No. 11, Witness Kern, received in evidence.)

Mr. Crosley was then Vice President of the Philadelphia & Reading Railway Company, but in Ex Parte 74 he submitted the plan for advancing coal rates in behalf of all carriers in Official Classification territory. He has since [fol. 842] died.

As to what the Interstate Commerce Commission said in its decision in Ex Parte 74 with respect to coal rates in Eastern Territory, I quote from page 248 of that decision:

"Carriers serving the Pennsylvania, Ohio and West Virginia coal fields propose to continue the existing differen-

tials in coal rates and have worked out a scheme of rates to effect that result. Carriers in Southern and Western groups propose to ignore existing differentials in these groups. The proposal of the Eastern lines to preserve existing relationships is approved and carriers in the other groups should work out a similar plan for restoring relative adjustments in coal rates now obtaining in these groups (88). An effort should be made promptly to devise rates in each group that will yield as nearly as practicable the same revenue in the aggregate as would be afforded by a straight percentage increase on the basis herein approved."

As to Mr. Crosley's testimony throughout using an advance of 30 per cent, whereas that authorized in Ex Parte 74 was 40 per cent—at the time the Eastern carriers' proposal for an advance in coal rates was submitted by Mr. Crosley, the decision of the United States Railroad Labor Board had not been made. The necessity of the rates at the time this proposal was made was based on the expenses as they then existed, and it was proposed to get the entire increased revenue required from freight traffic. The La- [fol. 843] bor Board awarded a larger increase and consequently an additional 10 per cent increase in rates was added by the Commission to freight rates.

At page 10 of my Exhibit No. 11, or on page 599 of the transcript of the testimony, Mr. Crosley stated: "To line point destinations on and west of a line extending from Sandusky, Ohio, via Baltimore & Ohio Railroad, Shelby Junction, C. C. C. St. L. Railway, through Galion and Delaware to Springfield, Ohio, it is suggested (89) that all rates be advanced in accordance with the scale applied to the producing regions designated in I. & S. Docket 774 as the Inner Crescent, consisting of the Pittsburgh, Connellsville, Fairmont, Kanawha, Kenova-Thacker and Eastern Kentucky Districts, preserving the established differentials from other districts."

On page 11 of Exhibit 11, or page 600 of the transcript of Mr. Crosley's testimony, it is set forth that "To destinations east of the Sandusky-Galion line, to and including Rochester, New York, and including the Mahoning and Shenango Valleys, it is suggested that the Connellsville District rates be used as the basis from the producing fields in Pennsylvania, Eastern Ohio and Northern West Virginia,

preserving established differentials; that on traffic from [fol. 844] Southern West Virginia and Eastern Kentucky the Kanawha District rates to be used as the basis, preserving established differentials from the Pocahontas, New River and Southern Ohio Districts."

Effective August 26, 1920, the carriers published advanced rates in pursuance of the Commission's decision in Ex Parte 74 and the plan presented by Mr. Crosley and adopted by the Commission.

The Public Utilities Commission of Ohio suspended the tariffs naming the Ex Parte 74 advances in I. & S. Docket No. 51, and hearings therein were held on December 3, 1920, and January 4, 1921, before the Commission. On January 14th the Public Utilities Commission (90) of Ohio handed down its opinion and order rejecting the tariffs on the ground that the increases proposed were more than 40 per cent, which percentage of advance the Commission had previously permitted the carriers to publish by order dated August 17, 1920, bearing no number. The carriers, because the position taken by the Ohio Commission deprived them of some of the revenues they had expected as the result of Ex Parte 74 and also because it disrupted long established and well recognized origin group relationships, appealed to the Interstate Commerce Commission through the medium of a Thirteenth Section Application. This was assigned I. C. C. Docket 12851 and styled "In the Matter of Intrastate Coal Rates in the State of Ohio."

[fol. 845] My next exhibit, No. 12, is a partial copy of a map introduced by Witness H. A. Cochran as Exhibit No. 16 in Docket 12851.

(Respondents' Exhibit No. 12, Witness Kern, received in evidence.)

It shows the method by which rates were advanced under Ex Parte 74 to destinations in Ohio. Before explaining the map I want to state that some of them are colored, as I shall explain, whereas others are all in black. That is due to the fact that the colored maps were printed and came out black and we did not have sufficient time to recolor them.

The solid red line appearing upon the exhibit which begins at Sandusky, Ohio and follows the east side of The Baltimore & Ohio (91) Railroad southwardly through

Plymouth, Shelby Junction and the Big Four road, east of Galion, Edison, Mount Gilead, thence east immediately north of the line of the Pennsylvania Railroad through Brink Haven, Millersburg, north of Massillon and Canton, Ohio and south of Youngstown to the Ohio-Pennsylvania State Line, thence in a general northeastwardly direction circumscribing what might be generally termed the then existing Buffalo rate group. Within the territory so circumscribed Group 1 appears in red, and by noting the key [fol. 846] at the lower right hand corner of the exhibit it will be observed that rates to Group 1 from Pennsylvania, Eastern Ohio and Northern West Virginia, or in other words, from Massillon, Middle No. 8, Cambridge Districts of Ohio, Pittsburgh and Connellsville Districts of Western Pennsylvania, and the Fairmont Districts of Northern West Virginia, the Ex Parte 74 increases were made by applying 40 per cent to the Connellsville District rates and plussing all rates by the resulting amount, thereby preserving the origin differential relationships. The rates from the origin districts of Southern Ohio, Southern West Virginia, Eastern Kentucky and Virginia, which include the Crooksville, Hocking and Pomeroy Districts of Ohio, the Kanawha, Kenova-Thacker, Pocahontas, New River and Tug River Districts of Southern West Virginia to Group 1 territory were advanced using the Kanawha District rates as the base.

The broken red line extending from the solid red line at a point near Brink Haven on the Pennsylvania Railroad, northeasterly (92) to a point southwest of Youngstown, Ohio circumscribes Group 2. This is generally termed the Canton-Massillon destination rate group. Rates from the districts I have named in Eastern Ohio, Pennsylvania and Northern West Virginia to this group were [fol. 847] advanced a straight 40 per cent, which is to say no origin relationships were preserved, because in this instance no fixed differential relationships were then recognized. From the origin districts of Southern West Virginia, Eastern Kentucky, Virginia and Southern Ohio to Group 2 the Kanawha District rates were used as the base for the increase, as in the case of Group 1.

Q. Now when you said no fixed differential relationships were then recognized did you mean origin relationships?

A. Yes, sir. Group 3, which is that territory in Ohio

south of Groups 4 and 2, to which all rates were advanced 40 per cent without observing previously existing origin relationships—the black line extending southwardly immediately east of Sandusky, Ohio and east of The Baltimore & Ohio Railroad through Willard, Plymouth and the Big Four through Galion is the so-called Sandusky-Galion line, marking the territories which the Commission termed in I. & S. 774 as affected and non-affected territories, and which have since become generally known under those terms. Within affected and non-affected territories the rates from all Ohio Districts and from the Inner and Outer Crescent Districts of Western Pennsylvania, West Virginia, Eastern Kentucky, Virginia, and Tennessee are aligned in a differential adjustment, and these (93) were under Ex Parte 74 advanced, using the Kanawha rates as the bases.

[fol. 848] The broken purple line, which is intended to carve out of Group 1 the Akron, Ohio destination group, was not on the original map introduced by Mr. Cochran as Exhibit No. 16 in Docket 12851, because at that time and until December 1, 1924 on intrastate traffic, and January 1, 1925 on interstate traffic, the rates to Akron from origin districts in Eastern Ohio were differentially related to those from the Western Pennsylvania and Northern West Virginia Districts. On those dates, however, the carriers abolished these differentials and adjusted the rates to Akron from the Eastern Ohio Districts so as to reflect rates 126 per cent of those in effect on August 25, 1920, which is to say that they accorded to Akron rates reflecting the Ex Parte 74 increase of 40 per cent less the July 1, 1922 reduction of 10 per cent. In other words, the present scheme of coal rates is 126% of the rates which were in effect on August 25, 1920. That percentage of course being qualified to the extent that differentials were observed. I am speaking to the Akron group now. The Interstate Commerce Commission had rendered no decision in Docket 12851 by the time of the 10 per cent reduction (94) in rates ordered by it effective July 1, 1922 in Docket 13293, Reduced Rates 1922, 68 I. C. C. 676, and accordingly, as will be noted from historical rate statements I shall subsequently introduce, the carriers maintained into the differential territory in Ohio, which I have explained, two sets of rates, one of interstate ap-

plication, the other intrastate. The reductions effective [fol. 849] July 1, 1922 were effected by observing the same procedure as in the instance of the Ex Parte 74 advances.

The decision of the Interstate Commerce Commission in Docket 12851 was rendered in the report styled "Ohio-Michigan Coal Cases," 80 I. C. C. 663, and was disposed of in the following language (p. 690):

"We find that the application by respondents of rates for the transportation of bituminous coal in carloads in intrastate commerce from mines in Ohio to destinations in affected territory in Northwestern Ohio and in non-affected differential territory in Northeastern Ohio lower than the rates applied for correspondingly similar services in the transportation of bituminous coal in carloads in interstate commerce from those mines to destinations in such territories in Ohio has resulted and will result in undue preference of shippers and localities and intrastate commerce within the State of Ohio, undue prejudice to shippers and localities in interstate commerce and unjust discrimination against interstate commerce.

"The differentials between Southern Ohio and the Crescents prescribed in this report on interstate traffic will go far to remove (95) the undue prejudice and preference and unjust discrimination against interstate commerce, which we find to exist in the relationship of interstate and intrastate rates from Ohio, and it may be that respondents, upon application to the Ohio Commission, will be authorized to complete the removal and restore the rate parity formerly existing. No order will be entered at this time in Docket 12851."

[fol. 850] No order has since been entered. Thereafter the Ohio Commission, in accordance with this Commission's findings in Docket 12851, permitted the carriers to publish, effective September 27, 1923, rates from origins in both Southern and Eastern Ohio to destinations in affected territory in Northwestern Ohio, and non-affected differential territory in Northeastern Ohio, which includes all of the destinations involved in this proceeding, except Canton and Massillon, Ohio (96), which reflected increases under Ex Parte 74 and reductions of July 1, 1922 apply to the selected base groups which I have heretofore mentioned and observing the established differentials. These rates

were published in Agent Davis' Tariff I. C. C. 43 and in connection with each the following note applies: "The rates named in this tariff, in connection with which reference is made to this note, restore the parity with the interstate rates, and the differential relationships with the Pittsburgh and Connellsville Districts which existed for many years prior to August 26, 1920, and are in harmony with the report of the Interstate Commerce Commission in the Ohio-Michigan Coal Cases, 80 I. C. C. 663, at page 690."

When, therefore, the Public Utilities Commission of Ohio, by orders either permissive or mandatory, as I have [fol. 851] explained, and which have been offered of record here as exhibits, caused reductions in rates to the territory in Northeastern Ohio, including Mansfield, which the Commission in the Ohio-Michigan Coal Cases termed non-affected differential territory, it is my understanding that the agreement between the Ohio carriers as a whole and the Public Utilities Commission of Ohio which grew out of the findings of the Interstate Commerce Commission under the Thirteenth Section of the Interstate Commerce Act was either violated or thrown out of the window.

The carriers, or at least those for whom I now speak, with the establishment of the rates effective September 27, 1923 (97), which restored the differential relationships as contemplated in the findings of the Interstate Commerce Commission, believed that those relationships were thereby permanently established and that they would encounter no further difficulty in connection therewith. In fact, it was always their belief that the findings of the Interstate Commerce Commission were in effect adopted by the Ohio Commission when tariffs naming rates in accordance therewith were accepted by the Ohio Commission and that the Interstate Commerce Commission finding thereby became tantamount to a formal order. It is obvious that had not [fol. 852] the carriers taken this view of the situation they would have insisted upon the Interstate Commerce Commission supporting its findings by formal order. The very fact that an understanding was reached with the Ohio Commission, which in the judgment of the carriers disposed of the necessity of the Interstate Commerce Commission issuing a formal order, in my mind indicates that that agreement should have been considered by all parties as a formal order of the Interstate Commerce Commission.

Q. Right there, Mr. Kern, do you know whether or not the tariffs filed immediately following that agreement and the Ohio-Michigan Coal Cases bore a notation on their face to the effect that the rates therein named resulted from this agreement with the Ohio Commission?

A. The tariff note is the one that I previously read and was to the effect that the rates so referenced restored the differential relationships in harmony with the decision of the Interstate Commerce Commission (98) in the Ohio-Michigan Coal Cases.

That note which was carried in the tariffs was prepared by counsel for the Ohio Commission, in conference with the carriers, for use in that manner.

[fol. 853] Before offering the rate maps which I have prepared, I desire to introduce as Exhibit No. 13 a map entitled "Ohio and Border Junction Points," which covers the particular territory involved in this proceeding, as well as the territory immediately adjacent to it, namely, Western New York, Western Pennsylvania, Western Ohio and the Southeast portion of the lower peninsula of Michigan.

(Respondents' Exhibit No. 13, Witness Kern, received in evidence.)

As may be noted from the legend appearing at the lower left hand corner of the map, the solid black blocks appearing throughout the area covered indicate the locations of by-product coke plants, the solid black dots indicate the locations of blast furnaces, and the stars the locations of iron and steel plants. The purpose for which I submit this exhibit is to show the importance of the iron and steel industry and the complementary by-product coke ovens. The fact that this particular area (99) is so highly industrialized is due to the immense production of iron and steel articles, and the map, I believe, denotes that these industries predominate in this territory. The iron and steel [fol. 854] industries, augmented by the by-product coke industry, which in most instances is an adjunct to blast furnaces, are perhaps the largest users of coal, and consequently one of the principal considerations in the fixation of bituminous coal rates and relationships is to permit these industries to obtain their coal supplies at transportation costs which do not act as a deterrent in the pro-

duction costs of the basic iron and steel products. For this reason it is evident that the carriers cannot radically disturb the destination relationships between the rates from all, or even a part of the origin districts furnishing these industries with their coal supplies without in some manner and to some degree affecting the steel industries.

In this proceeding there is before the Commission the reduced rates which have been published to Canton, Masillon, Mansfield, Cleveland and Lorain, all of which are steel producing centers and all but Mansfield make coke. Were these reduced rates permitted to remain in effect and extended to include origin districts outside of the State of Ohio, which seems inevitable, the Interstate Commerce Commission having permitted the reduced rates from the Pittsburgh & West Virginia Railway Pittsburgh District to the destinations involved to go into effect in I. & S. 3801 and the Ohio Commission, as I have previously explained, [fol. 855] ordered that (100) the same reductions be made in the Cambridge, Crooksville, Pomeroy and Hocking Districts to destinations in Northeastern Ohio the same in cents per ton as were made in the No. 8 District rates, with utter disregard of distance and origin differential relationships, there can be no doubt but that the producers of iron and steel articles and coke in the Mahoning and Shenango Valleys and Painesville, Erie, the Buffalo District, Toledo, Monroe and Detroit to say nothing of iron and steel and coke industries east and west thereof will demand similar reductions. This fact will probably be borne out in the course of this hearing. It is, therefore, the fact that the destination relationships are of much importance in the bituminous coal rate structure, notwithstanding that for the most part they do not reflect fixed differentials as in the case of the differentials in rates between the several origin fields.

It would be well if everybody would mark a star at Detroit, because there are iron and steel plants there.

My next exhibit, No. 14, shows the Ohio No. 8 coal producing district which extends eastwardly to the Ohio River, [fol. 856] where it abuts on the western edge of the Pittsburgh District. It also shows the boundaries of the destination rate groups involved in this proceeding as they

are recognized in the rates from the Ohio No. 8 District. (101) The black figures inserted in each of such destination groups indicate the present interstate rates from Ohio No. 8. The red figures are the Ohio intrastate rates resulting from the permissive or mandatory orders of the Ohio Commission, which I have introduced and explained.

(Respondents' Exhibit No. 14, Witness Kern, received in evidence.)

The destination rate group marked "Cleveland Group", it will be noted, extends westwardly to and including Huron, Ohio. The red figure of $1.45 representing the intrastate rate from the No. 8 district does not apply to Huron, where the rate is $1.55. However, the interstate rate shown in black of $1.74 does apply to Huron.

Prior to all these reductions which became effective at various times, beginning on or about August 1st, the intrastate rates were the same as the interstate rates.

[fol. 857] Prior to the occurrences which give rise to this proceeding, the intrastate rates in Ohio from No. 8 District to the destination groups shown on my Exhibit No. 14 were the rates shown in black in each one of these groups (102).

The reduction in the rate to the Canton group, including Massillon, of 18 cents per ton, or from $1.26 per net ton to $1.08 per net ton was required by the Ohio Commission in its order in the Republic Steel Corporation case, Docket 7252. The reductions of 23 cents per ton to Akron and 29 cents per ton to Cleveland came about through the permissive orders of the Ohio Commission which I have explained. As the witness for all defendants in the Republic Steel Corporation case, I pointed out that the destination group rate adjustment which accorded Canton a rate of $1.26, Akron $1.51 and Cleveland $1.74, represented a reasonable progression of rates and I very plainly indicated that a disturbance in the rate to Canton and Massillon would bring about a misalignment and probably result in substantially similar reduction in the rates to groups north thereof, particularly Akron and Cleveland. I believe that the subsequent actions of the No. 8 lines as the result of the application through permissive orders of the Ohio Commission of substantially the same basis of rates to Akron and Cleve-

[fol. 858] land as prescribed to Canton and Massillon clearly prove that the present interstate adjustment properly relates these destination groups one to the other, and that substantially the same relationships would result regardless of the basis that might be employed in making the rates.

At this time I resire to state that the interstate rate from the No. 8 District to Cleveland is not the base rate to Cleveland (103), but is constructed differentially 10 cents under the Pittsburgh District to Cleveland base rate, with which I shall subsequently deal in greater detail. It will be observed on this exhibit that the red and black rates to the Mansfield group are the same, because the only changes made in rates to Mansfield were from the Cambridge District.

My Exhibit No. 15 shows the Cambridge District in Ohio and the group rates obtaining therefrom, both state and interstate, to the Canton, Akron, Cleveland, Ashland, New London and Mansfield groups.

(Respondents' Exhibit No. 15, Witness Kern, received in evidence.)

Here also the intrastate rate to Huron, Ohio seemingly appears as $1.45, the correct figure being $1.55. The in-[fol. 859] terstate rate of $1.74 is correct as applied to Huron. It will be observed that there has been no reduction made in the intrastate rates from Cambridge to the Canton group or to the Ashland or New London groups. In the Republic Steel case, Docket 7252, as the witness for all defendants I showed, and shall do so again in this proceeding, that the Cambridge District for a long period of years was accorded the same rate to Canton and Massillon, Ohio as the No. 8 District and contended that no proper consideration could be given to the lawfulness of the No. 8 District rate, which did not take into account the Cambridge District. The Ohio (104) Commission, however, saw fit to disrupt the relationship and reduce the No. 8 rate by 18 cents per ton, as appears on the previous exhibit. In the instance, however, of rates to Akron and Cleveland, this exhibit shows that the intrastate rates are now lower than the interstate rates, in fact, are the same as the intrastate rates from the No. 8 District shown on the previous exhibit. The reduced intrastate rates from Cam-

bridge to Akron and Cleveland groups are the direct result of the order of the Public Utilities Commission in Docket 8072, which I have previously introduced and explained. It is rather difficult to understand why the Ohio [fol. 860] Commission saw fit to disturb the parity in rates from the No. 8 and Cambridge Districts to Canton and Massillon while insisting upon its preservation to Akron and Cleveland. Any reason for differentiating in the rates from these two origin groups to Canton and Massillon it would seem ought to apply with equal force to the rates to Akron and Cleveland. The reduced intrastate rate of $1.51 to Mansfield appearing upon this map came about as a result of the order of the Ohio Commission in the Empire Steel case, Docket 7036, which I have previously introduced and dealt with.

The rates shown in red on the exhibit, being the intrastate rates now in effect, prior to August of this year were identical with the interstate rates shown in black from the various groups.

(Mr. Ballard objected (105) to the evidence attacking the changes in relationships in intrastate rates, the same objection to be taken as going to all evidence offered by the respondents which relates to relationships among intrastate rates. Examiner Trezise stated that the objection would be noted and would be understood as applying, as to such evidence, throughout the record.)

[fol. 861] As to the rate of $1.55 instead of $1.45 to Huron, the map is based upon the interstate rate adjustment and the state rates are inserted under the interstate rates. As a result of the Ohio Commission's actions the parity in rates between Cleveland and Huron has been disrupted and Huron now takes a 10 cent higher rate for intrastate movements than the interstate rates. On this exhibit it is from Cambridge and on the preceding exhibit it is from No. 8. As to whether there are no interstate rates from the (106) Cambridge District to the Cleveland group, I am not talking about routes. We have actually published two rates, one being strictly an Ohio proposition, the other being in the files of the Interstate Commerce Commission, and on that basis I make my differentiation. I mean that if there were combination, for example, from some other point we could use that rate. It is purely a theoretical thing to do, but it

makes an easy way to differentiate between the rates we have got and what we want. It would not be theoretical if the rate was actually used in combination on an interstate movement.

To conclude my comments on Exhibit No. 15 I merely (107) want to state that before the decision and order of the Ohio Commission in the Mansfield case the Cambridge District rates were made on the Number 8 basis, which in turn was made 25 cents a ton under Pittsburgh. That rela- [fol. 862] tionship was off by 2 cents, due to necessary compliance with the Ohio long and short haul clause, and the Number 8 rate was $1.78 and the Cambridge rate was $1.76.

(108) Exhibit No. 16 shows the area known as the Middle-Coshocton District in Ohio.

(Respondents' Exhibit No. 16, Witness Kern, received in evidence.)

Heretofore in my testimony I have used the terms "Middle District" and "Middle-Coshocton" districts interchangeably. From the standpoint of rates those districts are one and the same and the term "Middle-Coshocton" grew out of certain decisions of the Ohio Commission which treated the district in that manner, so that when I say "Middle" or "Middle-Coshocton" I mean the same thing.

It will be observed that this district extends in one instance slightly across the Ohio-Pennsylvania state line. Of course no reductions have been made in the interstate rates (109) obtaining from the origin points in Pennsylvania. The reduction shown in the interstate rate of $1.01 to the intrastate rate of 80 cents to the Canton group was the result of the decision of the Ohio Commission in the Republic Steel Corporation Case, Docket 7252, and the reduction to Akron and Cleveland came about in connection with orders of the Ohio Commission which I have previously explained. Here, as in the instance of my exhibit dealing with the Number 8 District, I desire to point out that the present interstate progression of rates beginning with that of $1.01 to the Can- [fol. 863] ton group, then $1.26 to Akron, and $1.54 to Cleveland is a reasonable and natural rate of progression, and that the intrastate rate of progression closely approximates this and again proves that from the standpoint of destina-

tion relationships the interstate ratio of progression for which I am here contending is right and will be reflected in the rates regardless of the basis upon which they are constructed. The rate from the Middle-Coshocton District to Cleveland, Ohio interstate of $1.54 is and for many years has been made differentially 20 cents a ton under the Number 8 rate, or 30 cents per ton under the basic Pittsburgh District rate. It will be noted that the intrastate basis changes this differential relationship with Number 8 by but 3 cents per ton.

On that map the Huron rate is shown in the Norwalk group and is so drawn because Huron takes a different rate interstate (110) from the Middle District than does Cleveland.

My next Exhibit, No. 17, is a map of the Pittsburgh District adjustment of rates to the territory in northeastern Ohio. The outlines of the Ohio No. 8 District are shown on this map as a dotted black line to denote the close proximity of the two groups, being separated only by the Ohio River.

It also shows the boundaries of the Connellsville and Fairmont Districts situated directly south of the Pittsburgh [fol. 864] District. The rates appearing within the several named destination rate groups apply from the Pittsburgh District, and in the statement of rates at the lower lefthand corner of the map the rates from the Ohio No. 8, Connellsville and Fairmont Districts are shown.

(Respondents' Exhibit No. 17, Witness Kern, received in evidence.)

In this tabulation the differentials are expressed over Ohio No. 8 for convenience only, and it is not to be taken as indicating that the Ohio No. 8 rate is the base rate in the adjustment. Looking at the statement it will be observed that to the Youngstown Group, otherwise known as the Mahoning and Shenango Valley, the Pittsburgh and No. 8 rates are approximately the same. The Pittsburgh District rate to Youngstown was before the Interstate Commerce Commission in I.C.C. Docket 4606, Youngstown Sheet & Tube Company v. P&LE (111) Railroad, 29 I.C.C. 428, decided February 8, 1914. In this case the commission approved the then existing rate of 70 cents per net ton from the Pittsburgh District to Youngstown, which, when subjected to

the several general changes in bituminous coal rates, which I will later describe, produces the present rate of $1.34 per net ton.

The Ohio No. 8 District rate has since been and even before the decision of the commission was the same as the Pittsburgh rate to Youngstown. In the case of the Youngstown Sheet & Tube Company the commission found that the [fol. 865] mileages from the Pittsburgh District to Youngstown were 99.3 miles via P&LE Railroad and 100.2 miles via Baltimore & Ohio Railroad. In the distance exhibit I shall subsequently offer it will be found that the distances from the Pitsburgh District to Youngstown are not substantially different today. The distance from the Ohio No. 8 District the commission stated as 105 miles. I have included in the Pitsburgh District as drawn on this map the socalled Freeport District, which although recognized as a separate district in the tariffs of the Bessemer & Lake Erie Railroad, normally takes the Pittsburgh District rates westbound. The only exception to this is the instance of a relatively few rates to some destinations west of the Cleveland destination group. Rates from the Freeport District to Youngstown were before the commission in I.C.C. Docket 12774, Republic Iron & Steel Co. v. Baltimore & Ohio R.R. Co. et al., 83 I.C.C. 429, decided October 18, 1923. (112) At the time of the hearings in this case the rate was $1.50 per net ton from the Freeport District to Youngstown, which was the Pittsburgh District rate in effect immediately before the 10 per cent reduction of July 1, 1922. Here the commission referred repeatedly to the Freeport District as the Pittsburgh District and found the rate to be not unjust or unreasonable. The distance recognized by the commission from Russellton, a point in the Freeport District, or, as the commission termed it, Pittsburgh District, was 85.1 miles via Bessemer [fol. 866] & Lake Erie Railroad, Butler B&O Railroad, and 105 miles via Bessemer & Lake Erie Railroad, Shenango, Erie Railroad, which indicates the substantial parity in the distances from the B&LE Freeport District and the Pittsburgh District to Youngstown.

In I. & S. Dockekt 774, 46 I. C. C. 66, at page 73, the Interstate Commerce Commission stated:

"After the hearing in the original cases and while they were still pending the commission promulgated their re-

port on supplemental hearing in the Five Per Cent Case, 35 I. C. C. 325 and 331, and in which it referred to the rate on bituminous coal from the Pittsburgh District to Youngstown, Ohio as the 'key' rate."

By this the commission meant that the Pittsburgh to Youngstown rate was the base or key rate to territory in northeastern Ohio, which includes the groups shown upon this map as Canton, Akron, Cleveland, Norwalk and Mansfield. To all of these groups (113) the Pittsburgh rate is built upon the key rate to Youngstown and therefore constitutes the base rate in the adjustment. So in the instance of Youngstown we have a parity between Number 8 and Pittsburgh District rates—and Cleveland is made 10 cents under Pittsburgh, and at Mansfield 25 cents under Pittsburgh. The adjustment to Canton and Massillon from Number 8 is in the nature of a short haul adjustment and is not differentially related to Pittsburgh. To Akron the [fol. 867] Number 8 rate was differentially 15 cents under Pittsburgh until December 1, 1924, on intrastate traffic, and January 3, 1925, on interstate traffic when, as I have stated previously, the relationship was disrupted and Number 8 accorded a rate based upon the application of the Ex Parte 74 increase and July 1, 1922, reductions on its own basis. The rate from the Pittsburgh District to Canton, Ohio was before the Interstate Commerce Commission in Docket 8899, Canton Chamber of Commerce v. P. R. R. et al., reported first in 56 I. C. C. 293 and on further hearing at 62 I. C. C. 726. This was a section 3 proceeding in which the issue was the destination relationships between the Pittsburgh and Connellsville District rates to Canton versus rates to Youngstown and Cleveland, Ohio. The commission in effect decided that rates to Canton from the Pittsburgh and Connellsville districts should reflect the relationship of one-half the difference between the Pittsburgh and Connellsville to Youngstown and Cleveland rates. In other words at the time of the decision the rate from the Pittsburgh District (114) to Youngstown was $1.10 and to Cleveland $1.50, a difference of 40 cents. As a result of this decision the Canton rates were fixed at $1.30, 20 cents over Youngstown and 20 cents under Cleveland. At the present time it will be observed from the map the Youngstown rate is $1.34 and the Cleveland rate $1.84, a difference of 50 cents. The rate to Canton of $1.59 is 25 cents over Youngstown

[fol. 868] and 25 cents under Cleveland. As will be noted in subsequent decisions the actual result of this decision was a 10 cent reduction in the rate to Canton, Ohio, that is, in the Pittsburgh and Connellsville rates.

As indicative of the reasonableness of the Pittsburgh to Cleveland rate, and aside from the fact that the commission used both it and the rate to Youngstown as a means of determining the rate to Canton, I direct attention to I. & S. 774, 46 I. C. C. 66, which at page 81 recites the fact the rate of $1.00 per net ton obtaining prior to the 15 cents advance of July 1, 1917, from the Pittsburgh District to Cleveland formed the basis for the then existing rate of $1.00 per net ton from the Hocking or Southern Ohio Districts to Toledo, which rate in turn constituted the foundation for the entire rate structure from the Ohio Districts and the Crescents to affected and non-affected territories. It seems to me that the use of the Pittsburgh District to Cleveland rate in the determination of the important Hocking to Toledo rate is significant of the reasonableness (115) of the former as well as of the competitive relationships which exist between Cleveland and Toledo, the two foremost lake ports on Lake Erie in the State of Ohio. At the present time the Pittsburgh District rate to Cleveland of $1.84 is 5 cents per ton lower than the Hocking to Toledo rate.

There is a correction on my exhibit 16 which I would like [fol. 869] to explain at this point. In the Cleveland Group showing an intrastate rate $1.22 from the Middle-Coshocton District, I include Lorain and South Lorain, to which the rates are $1.28 in accordance with my Exhibit 2. That is the correction I had in mind when I was talking about Huron.

In commenting on Exhibit 17 I mentioned the average mileages from the No. 8 District to Youngstown. That average mileage was 105 miles, found by the commission in that case of the Youngstown Sheet & Tube Company. (116) I did not mention the average distance from the Pittsburgh District to Youngstown. I did mention the distance via the P. & L. E. reported in that case to Youngstown being 99.3 miles and via the B. & O. 100.2 miles. That was via that particular route, from mines on the P. & L. E., 99.3 miles, and 100.2 miles from mines on the B. & O. That is all the mileages they gave in that decision. That decision

was 29 I. C. C. 428, Youngstown Sheet & Tube Company v. P. & L. E. I used practically the language of the Commission. They simply said that the mileage from the No. 8 District to Youngstown was 105 miles. I can't expand on that any more.

My next Exhibit, No. 18, is drawn upon the so-called C. F. A. Junction point map and sets forth the adjustment of rates as it obtained from the Kanawha, Kenova-Thacker, [fol. 870] high volatile districts, and the Pocahontas, New River and Tug River low volatile districts of southern West Virginia.

(Respondents' Exhibit No. 18, Witness Kern, received in evidence.)

(117) The destination territory in northern Ohio surrounded by the solid black line is the destination rate group taking $2.39 per net ton from the Kanawha, Kenova and Thacker Districts. To this territory generally the adjustment from the southern high volatile districts, that is, Kanawha, Kenova-Thacker, is differentially 50 cents per net ton over the southern Ohio and from the low volatile or New River, Pocahontas, Tug River Districts, the rates are 25 cents per ton over the Kanawha rate, or 75 cents over the southern Ohio rates.

The dotted black lines within the area embraced by the solid black line indicates that to which the Public Utilities Commission of Ohio required reductions in Docket No. 8072 heretofore explained. It will be observed that the Ohio intrastate rate of $1.60 to Cleveland, Lorain and intermediate points, and $1.70 per net ton to Huron and certain intermediate points, reflect the same measure of reduction as was made in the rates from the Number 8 District to the same points of destination. This the Ohio Commission required in the face of testimony indicating [fol. 871] that there never has been any fixed origin differentials as between the southern and eastern Ohio groups, and the decision was promised solely upon the ground that the reduction in the Number 8 rates without a corresponding adjustment from southern Ohio unduly preferred the former and discriminated (118) against the latter. Strange as it may seem, however, in the instance of Canton and Massillon, Ohio, where rates from the Number 8 District were reduced in pursuance of the order of the Ohio Com-

mission in Docket 7252, also from the Cambridge District to Mansfield where the rates from the Cambridge District had been reduced by the Ohio Commission in Docket 7036, no change in the southern Ohio rates was required, although the differences between the eastern Ohio groups and the southern Ohio groups were and are substantially greater than at Cleveland, Lorain, Huron, etc. The Pomeroy rates to the northern Ohio territory involved were, as I have previously explained, reduced by the order of the Ohio Commission in Docket 8097 by the same number of cents as were the rates from the Number 8 District. Here again the commission made a finding of preference and discrimination at Cleveland, Lorain, Huron, Akron, etc., but presumably are of the opinion that the widening of the differences in the rates from eastern Ohio vs. Southern Ohio at Canton, Massillon and Mansfield did not result in preju-
[fol. 872] dice. These apparent conflicting effects of the commission's decisions I am frank to state I cannot explain.

Viewing the rate situation as it obtains from southern Ohio to this territory and noting particularly the area carved out of the existing group and given a reduced rate, one can not but conclude that the existing situation brought about by authority of the State of Ohio is not justifiable. From the standpoint (119) of mileage competition or any other consideration known to freight rates, a lower rate from the Hocking and Pomeroy Districts can not be justified to Cleveland than to Toledo, and yet the Ohio Commission are admittedly without any jurisdiction to alter the Hocking to Toledo rate because of the fact that it has been fixed by the Interstate Commerce Commission as a part of the differential structure including the Ohio Districts and the Crescents to affected territory of which Toledo and the Toledo rate group are a part. It is also worthy of mention at this time that initially the Hocking to Toledo rate was made by the carriers the same as the Pittsburgh to Cleveland rate and is therefore on a somewhat lower level than the rates from eastern Ohio to Cleveland and vicinity which are made on differential relationships under Pittsburgh.

[fol. 873] As I have previously stated, and because of its importance I repeat, the Hocking To Toledo rate was recognized by the Commission in I. & S. 774 as the base or key rate in the adjustment to affected territory and rates to

the destination groups north and west of Toledo were fixed by the commission in that proceedings on basis of destination differentials over Toledo. Subsequently in the Ohio-Michigan Coal Cases and the case of the Indiana Chamber of Commerce versus Baltimore & Ohio Railroad, et al., 80 I. C. C. 591, these destination differentials were revised and made with regard to the rates to Detroit and Fort Wayne, but because of the relationship between the rate to (120) Toledo and Detroit from a practical standpoint there is no substantial difference between the present situation and that fixed in I. & S. 774. Certainly a downward revision in the rate to Toledo is bound to result in a general and corresponding lowering of the level sof rates into affected territory and probably non-affected territory and the West.

My next Exhibit, No. 19, is intended to bear out some of the remarks made in connection with the map exhibit No. 18. It is entitled "Statement of Average Distances, Rates, and Ton Mile Earnings on Bituminous Coal from active mines (which I will later explain) in the Hocking and Pom-[fol. 874] eroy Districts via short tariff routes to Toledo and Cleveland."

(Respondents' Exhibit No. 19, Witness Kern, received in evidence.)

The first page of the exhibit sets forth the calculation to Cleveland, and it will be noted that the average short line distance from the Hocking and Pomeroy Districts combined is 208.9 miles, and the ton mile earnings 9.05 mills. Page 2 shows that to Toledo the combined average distance from the Hocking and Pomeroy Districts is 207.1 miles, and the ton mile earnings 9.13 mills. These calculations are, it will be noted, based upon the interstate rate of $1.89. However, to Cleveland as a result of orders of the Ohio Commission previously explained, the present rate from both the Hocking and (121) Pomeroy Districts is $1.60, which, applied to the distance stated, produces ton mile earnings of 7.66 mills.

Exhibit No. 20 is a similar calculation of average short route distances from the Hocking and Pomeroy districts to other representative stations within the area taking the Toledo-Cleveland interstate rate of $1.89.

(Respondent's Exhibit No. 20, Witness Kern, received in evidence.)

It is to be observed that the rates to Bellefontaine, Ohio, earn 13.83 mills per ton per mile; to Bucyrus 13.60 mills [fol. 875] per ton mile, and to Piqua 12.19 mills per ton mile. These localities are all within the Toledo Group of affected territory and the rates thereto have been declared by the Interstate Commerce Commission to be reasonable in cases to which I have previously made reference.

(Mr. Ballard objected to exhibits 19 and 20 to the extent to which they were offered to show the reasonableness (122) of the former intrastate rate of $1.89, on the ground that that issue was not presented here (123). Mr. Orcutt stated they were introduced chiefly to show relationships. Mr. Ballard stated he had previously objected to any evidence showing relationship between intrastate rates (125). Examiner Trezise overruled the objection and it was understood that the objection and the ruling would apply to all evidence relating to the reasonableness of intrastate rates. Mr. Ballard saved an exception. Mr. Martin joined in the objection and saved an exception (126).)

Exhibit No. 21 is an uncolored map. Exhibit No. 22 is a colored edition of the (127) same map, or practically the same. Unfortunately, I have not enough of the colored maps to distribute, but I know everybody interested here [fol. 876] has a copy of that map somewhere in their record. I have given the examiner and the reporter copies of colored map.

(Respondents' Exhibits 21 and 22, Witness Kern, received in evidence.)

These maps show the origin districts comprising the so-called Ohio Districts, and the Inner and Outer Crescents; also the distination groups within affected and non-affected territories as defined by the Interstate Commerce Commission in I. & S. 774 and subsequent decisions involving this adjustment. Because a complete distribution was not made of the colored map I will briefly explain this grouping. The basic Ohio Districts, which as the commission has repeatedly stated, constitutes a foundation upon which this great rate structure rests, are the Number 8 and Cambridge

Districts of eastern Ohio and the Hocking and Pomeroy Districts of southern Ohio. These, as well as all other districts I shall refer to, are indicated on the map by name. The principal Inner Crescent Districts are the Pittsburgh District, including Freeport, Connellsville, Fairmont, Belington, Kanawha, Thacker-Kenova, Kentucky, Big Sandy, Hazard, McRoberts, Harlan and Jellico. The principal Outer Crescent Districts are (128) the Altoona, Meyersdale, Cumberland-Piedmont, Gauley, New River, Pocahontas, Tug River, Clinch Valley and Stonega. The geo- [fol. 877] graphic location of these chains of coal fields being in the general form of a crescent gave rise to the use of that term, the inner or concave side being called the Inner Crescent, and the outer or convex side, the Outer Crescent. On the colored map the Ohio Districts are shown in green, the Inner Crescent in what I will call pink, and the Outer Crescent in blue. This adjustment first came before the Interstate Commerce Commission in its entirety in I. & S. 774, "Bituminous Coal to C. F. A. Territory," 46 I. C. C. 66, to which I have previously made frequent references. As a result of that decision the commission adopted the general principles upon which the rate structure was built by the carriers and approved it generally. Briefly, the base rate was and is the Hocking or basic Ohio Districts to Toledo, which rate, as I have stated before, was made the same as the Pittsburgh District to Cleveland rate, thus forming a connecting link between the rate adjustment into northwestern Ohio and affected territory, and the adjustment into northeastern Ohio called non-affected differential territory, which is that before the commission in this proceeding.

I believe I have explained in some detail the general na- [fol. 878] ture of the makeup of the adjustment into affected territory, which incidentally as a whole has been recognized by the Interstate Commerce Commission to reflect a rate level less than reasonable (129) maximum, due to the depressed characters of the rates to Toledo and Detroit on the eastern end of the territory, and to Chicago on the western end. The last expression of the commission of this character is contained in the recent case, Allied Paper Mills vs. C. & O. Ry. et al., 183 I. C. C. 795. This map exhibit does not clearly show the distinction between affected and non-affected territory—I refer now to the un-

colored map—and I therefore desire to state that all of the destination areas defined upon the map, except those in which the cities of Indianapolis, Terre Haute and Chicago and groups west thereof are situated, constitute affected territory and the balance non-affected territory. On the colored map the heavy dotted line embracing the lower peninsula of Michigan, the northwestern quarter of Ohio and roughly the northern half of Indiana circumscribes affected territory. The origin differential relationships to affected territory, as prescribed by the Commission in the Ohio-Michigan Coal Cases, are set forth in the legend appearing in the upper righthand corner of the map, the uncolored map. That statement also shows the differential [fol. 879] arrangement to the several important groups of non-affected territory.

From a destination rate standpoint, the rates to Detroit were, in the case I have cited, approved on basis of 21 cents per ton over the Toledo or key rate. Rates to the Jackson, Michigan, Fort Wayne-Hartford City, Ind., group at 10 cents (130) over Detroit. The Lansing group, 30 cents over Detroit. To Kalamazoo group, 50 cents over Detroit, and to Grand Rapids group, 65 cents over Detroit. Rates to the Peru, Ind., group were made 5 cents over Fort Wayne, and to the Elkhart, Ind., group 20 cents over Fort Wayne. Rates to the South Bend group do not reflect a fixed destination-differential basis, but its relationship with the balance of the adjustment has the approval of the commission.

Rates to the destination groups within non-affected territary, particularly Indianapolis and Chicago groups, are on generally a somewhat lower level than to affected territory because of the competition which eastern coal meets with Indiana coals at Indianapolis and vicinity, and with Illinois and Indiana coals, as well as Lake Cargo coal in and about the Chicago district.

I have given this somewhat elaborate description of this enormous rate structure largely to indicate how insepara- [fol. 880] ble are the destination groups and to show that any disturbance of the key to the adjustment, namely, Hocking or Ohio Districts to Toledo rates, is bound to bring about reductions in every rate in the adjustment and will threaten through rates which now obtain on eastern coal to Western Territory, which in many cases are not much lower

than the combination rates in effect to and from Chicago Peoria, St. Louis and other western termini (131) of Central Freight Association territory. That this adjustment is by virtue of the Ohio intrastate reductions presented in this investigation in jeopardy can not be contradicted, and at this time I desire to call attention to the case recently filed with the Public Utilities Commission by Medusa-Portland Cement Company, which attacked rates on coal from the Number 8 District to Bay Bridge, Ohio, a point within affected territory. There have, since the filing of this case, been cases filed by the Chamber of Commerce of Sandusky and Toledo, Ohio, as well as numerous industries at Sandusky and also certain of the operafors in the Cambridge District of Ohio. This case is covered by Ohio Public Service Commission's Docket 8180 and was originally assigned for hearing at Columbus on November 28th. At the urgent request of defendants the hearing was postponed until De-
[fol. 881] cember 19th. The complainant's petition alleges that the existing rate of $1.89, which is the basic Ohio District to Toledo group rate as applied from the Number 8 District in Ohio to the complainant's plant at Bay Bridge, Ohio, is unjust and unreasonable in violation of section 512 and 504, unjustly discriminatory in violation of section 535, and unduly preferential and prejudicial in violation of sections 5, 6, 7 of the General Code of Ohio. It specifically sets forth that the basis for this allegation is the reductions made under orders of the Ohio Commission, which I have described, from the Ohio Number 8 District to Cleveland, Lorain and Huron, Ohio, and (132) seeks restoration of the rate situation formerly existing when the rates to Bay Bridge from the Number 8 District exceeded those to Cleveland, Ohio by 15 cents per ton.

By Mr. Herrold:

Q. Allow me to interrupt. Aren't you mistaken about the petition and the complaint being based upon rates that the Ohio Commission fixed, doesn't it specifically state the rates voluntarily established by the carriers? I think if you will read the complaint you will find that is a fact.

[fol. 882] The Witness: You and I differ on the word "voluntarily." At the present time the difference is 44 cents per ton. The Ohio Commission, on November 29th,

issued an order in this case permitting the Cambridge Colliery Company and the Akron Coal Company to intervene therein, which had the effect of broadening the issues of the complaint to take in the Cambridge District. In their petition of intervention these companies set up that rates from the Cambridge District to Bay Bridge, Ohio, and intermediate stations, Sandusky, Ohio, are and always have been the same as from the Number 8 District, and that in no event should they be made to exceed the Number 8 District rate. I believe it goes without saying that in the event the Ohio Commission pursues without restriction the same course as in connection with the previous cases I have explained, (133) it will require readjustment of the rates to Bay Bridge in keeping with what was done to the rates to Cleveland and other points involved in this proceeding, and the minute the integrity of [fol. 883] the adjustment into affected territory is destroyed, there is every reason to believe that the adjustment will run the course of a general reduction.

The rates shown on my Exhibit No. 21 to points in affected territory are rates applicable from the Southern and Eastern Ohio Districts, that is Hocking, Pomeroy, Number 8 and Cambridge. The recent decision of the Interstate Commerce Commission as to rates to Greenville, Ohio, is not in effect yet. As to whether some of these rates have been changed: The carriers have a petition for rehearing pending and the order now outstanding does not take effect until January 12. I may state, however, that there have been some slight changes in the destination group boundaries in Michigan as a result of the decision of the commission in the St. Johns Co-Operative Case, where they have preference and prejudice. But that rate was not unreasonable. (134.) In these Michigan situations some of the destination groupings have been changed, so that as a result of the change in the destination groupings some rates have been reduced. As to whether that will apply if the I. C. C.'s decision in the Greenville case stands—that there will be a reduction there because of the change in the group boundaries, that has not been worked out yet, and I don't know what [fol. 884] is going to happen as a result of that decision. The Commission are not as definite in it as they might have been.

If I might venture an opinion of what the Commission intended in that Greenville case (135), I think their purpose was to take Greenville out of the affected territory and put it in non-affected territory, the same as Richmond, Indiana. That seems to be their intent, but they don't say so. The destination group rate will still remain as was.

The reductions referred to by Mr. Herrold were made in Michigan as a result of a Section 3 order of the Interstate Commerce Commission. The decision says that the commission in that case found the rates to Michigan were not unreasonable. In both of the cases then decided there were Section 1 allegations. But the commission found the rates were not unreasonable. (136.) In that last answer I did not intend the Allied Paper Mills case. That was the St. Johns Co-Operative Case, 185 I. C. C. 669.

My next Exhibit, No. 23, commences a series of rate histories.

(Respondents' Exhibit No. 23, Witness Kern, received in evidence.)

[fol. 885] It sets forth the changes in the rates on coal from the Ohio Number 8, Pittsburgh, Connellsville and Fairmont Districts to Canton, Massillon, Cleveland and Lorain, beginning with the rates in effect immediately before the 15 cent advance of July 1, 1917, under Ex Parte 57, and the differences or differentials existing in the rates throughout the changes. As I have previously explained, the carriers have never recognized a fixed differential relationship between the Ohio Number 8 and the basic Pittsburgh District rates to Canton and Massillon, Ohio. Consequently, as may be noted from the exhibit, the differences at Canton have ranged from 25 cents per ton on April 24, 1920, with the establishment of rates from the Pittsburgh and Connellsville Districts under the decision of the commission in the Canton Chamber of Commerce Case (137), Docket 8899, reported in 62 I. C. C. 726, up to 40 cents per ton on June 25, 1918. At the present time the difference between the intrastate rate to Canton prescribed by the Ohio Commission in its Docket 7252, of $1.08, and the Pittsburgh District rate is 49 cents, the largest difference on record.

A similar situation is also presented in connection with the adjustment of rates to Massillon from Ohio Number 8 [fol. 886] versus Pittsburgh. Concerning the Pittsburgh-Connellsville differential, I direct attention to the fact that prior to August 30, 1917 there was a differential of 15 cents per ton. As a result, however, of I. & S. 774, this was reduced to 6 cents by specific order of the commission. During the period June 25, 1918 to August 15, 1919, the difference was 10 cents, due to the disruption of differentials brought about by General Order 28, which was corrected on the latter date by authority of Freight Rate Authority 8277. This I have previously explained at length. On the date last mentioned, however, the 6 cent differential was restored and has been adhered to consistently since. The Fairmont situation was the same as Connellsville until the decision of the commission in I. & S. 774 fixing Connellsville 6 cents over Pittsburgh, which had the effect of creating a differential of 9 cents, Fairmont over Connellsville. This, with the exception of the General Order 28 temporary disruption was adhered to until the carriers complied with the commission's decision in Docket 8899 effective April 24, 1920 (138), when, by reason of the required reduction of 10 cents per ton in the Connellsville District rates to Canton the differential Fair- [fol. 887] mont over Connellsville was widened by that amount or to 19 cents, which has been consistently maintained since that time.

With respect to the rates to Cleveland, I desire to direct attention to the fact that Ohio Number 8 rate has been consistently maintained 10 cents per ton under Pittsburgh, except during the period August 26, 1920 to September 27, 1923, when the controversy with the Ohio Commission culminating in the decision of the Interstate Commerce Commission in Docket 12851, which I have previously explained was in progress. As to the relationships now existing between the rates from Pittsburgh, Connellsville and Fairmont, it will be noted that since the decision in I. & S. 774 fixing Connellsville at 6 cents over Pittsburgh and resulting in Fairmont being 9 cents over Connellsville, the relationships have been preserved, except for the temporary General Order 28 disruptions. I might here state that the differential, Fairmont over Pittsburgh of 15 cents has existed for a period of more than 30 years.

My next exhibit, No. 24, sets forth the history of the rates [fol. 888] from the Ohio Number 8, Pittsburgh, Connellsville and Fairmont Districts to Youngstown, which is typical of the group within which that city is located, namely the Mahoning Shenango Valleys. It will here be noted that the Number 8 and Pittsburgh (139) rates have since been maintained identically except during the period August 26, 1920 and September 27, 1923, when the Thirteenth Section Case disposed of in the decision of the Interstate Commerce Commission in the Ohio-Michigan cases, and Docket 12851 were pending. It will be noted that the rate in effect immediately before the 15 cent advance of July 1, 1917 was 70 cents, the same as was approved by the commission in the case of the Youngstown Sheet & Tube Co. v. P. & L. E. R. R., 29 I. C. C. 428, to which I previously referred, also that the rate in effect as of August 26, 1920 from the Pittsburgh District is the same as that approved by the commission in the case of the Republic Steel Company v. B. & O. R. R., 83 I. C. C. 429; involving the rate from Russellton, Pa., to Youngstown, Ohio.

[fol. 889] I desire to call attention to the fact that the rates to Youngstown, as well as the rates to Canton, Massillon, Cleveland and Lorain set up in the previous exhibit, have been subjected only to the changes of the general character prescribed or authorized by the Director General or the Interstate Commerce Commission in Ex Parte 57, I. & S. 774, General Order 28, Exparte 74, and Reduced Rates 1922, except, of course, in the instance of the adjustment from Pittsburgh and Connellsville to Canton which the commission prescribed in I. C. C. Docket 8899. All of the changes were made in strict accordance with the method approved by the Director General or Interstate Commerce Commission which I have previously explained at length (140).

(Petitioners' Exhibit No. 25, Witness Kern, received in evidence.)

Exhibit No. 25 is a restatement of the history of the rates to Cleveland and Lorain given in detail in Exhibit 23. This is merely a convenient setup of the history.

[fol. 890] (Respondents' Exhibit No. 25, Witness Kern, received in evidence.)

Exhibit No. 26 is a history of the rates from the Number 8, Pittsburgh, Connellsville and Fairmont Districts to Huron, Ohio.

(Respondents' Exhibit No. 26, Witness Kern, received in evidence.)

In the instance of the Ohio Number 8 District, Huron has always had the same rate as Cleveland, but as may be noted under the intrastate adjustment, it is accorded 10 cents higher than Cleveland. From the Pittsburgh and Connellsville Districts the rates to Huron constitute what might be called a "buffer" group between the Cleveland group and the Toledo group of affected territory. No fixed differentials have ever been observed as between the eastern Ohio fields on the one hand and those districts on the other, but the differentials between Pittsburgh, Connellsville and Fairmont Districts have been observed the same as at Cleveland and Lorain (141).

Exhibit No. 27 is a convenient restatement of the history [fol. 891] of the rates to Canton, Ohio, shown in detail in Exhibit No. 23.

(Respondents' Exhibit No. 27, Witness Kern, received in evidence.)

Exhibit No. 28 gives the same information for account of Massillon, and Exhibit No. 29 for account of Youngstown.

(Respondents' Exhibits No. 28 and 29, Witness Kern, received in evidence.)

Exhibit No. 30 is a history of the rates to Akron, Ohio, in connection with which I merely desire to point out fixed differentials as between the Pittsburgh, Connellsville and Fairmont Districts on the one hand and the Ohio Number 8 District on the other, were maintained, subject of course to the temporary disruption occurring during the periods I have previously stated, until December 1, 1924 on intrastate traffic, and January 1, 1925 on interstate traffic, when a 6 cents per ton reduction was made, which gave to Akron a rate [fol. 892] of $1.51, reflecting the basis of 126 per cent of the August 26, 1920 rates. In view of the fact that this rate of $1.51 is that for which the Ohio Commission unsuccessfully

contended in the previous Thirteenth Section Case (142), their recent action resulting in a 26 cent reduction below that figure might well be questioned.

(Respondents' Exhibit No. 30, Witness Kern, received in evidence.)

Exhibit No. 31 is a concise history of the rates from the Number 8, Pittsburgh, Connellsville and Fairmont Districts to Alliance, Ohio.

(Respondents' Exhibit No. 31, Witness Kern, received in evidence.)

Rates to Alliance, Ohio, are brought in issue in this case because they were reduced from both the Number 8 and Middle Districts as a result of the decision of the Ohio Commission in the Republic Steel Corporation Case, Docket 7252, [fol. 893] Alliance being intermediate to Canton and Massillon via some routes, notably those from origins on the New York Central Railroad via routes in connection with the Pennsylvania Railroad. Alliance, as I shall subsequently show, consumes large volumes of Ohio coal and the reduction in these rates as a necessary incident to the Massillon-Canton reductions has been quite costly to the carriers.

My next exhibit, No. 32, gives the histories of the rates from Hocking and Pomeroy Districts of Southern Ohio, the Kenova-Thacker, Kanawha high volatile districts of West Virginia (143), and the Pocahontas, Tug River and New River low volatile districts of Southern West Virginia and Virginia to Cleveland, Lorain, Huron, Canton, Massillon, Akron and Mansfield, Ohio.

(Respondents' Exhibit No. 32, Witness Kern, received in evidence.)

To all of these destinations, except Mansfield, Ohio, these [fol. 894] rates are and always have been differentially related, and incidentally have been the same as the rate to Toledo destination group of affected territory. Taking as an illustration the rates to Cleveland, Ohio, appearing on the first sheet of the exhibit, it will be noted that the Hocking rate up until the 15 cent advance of July 1, 1917, was $1.00 per ton, the Kenova-Thacker, Kanawha rate 25 cents

over, or $1.25, and the Pocahontas, Tug River, 10 cents over Kanawha until April 12, 1915, and thereafter 20 cents over Kanawha. On August 30, 1917, as a result of the decision and order of the commission in I. & S. 774, the rates to Toledo from the Hocking District were approved, and from the Kanawha, Kenova-Thacker and Pocahontas, New River and Tug River Districts increased uniformly by 15 cents per ton. Carrying out the practice of maintaining rates from these origins to Cleveland the same as to Toledo, the Cleveland rate was also increased 15 cents per ton. Throughout the changes under General Order 28, Ex Parte [fol. 895] 74 and Reduced Rates 1922 the differential relationships (144) I have last stated were preserved, except during the temporary intervals following General Order 28 and Ex Parte 74 which I have previously explained. On September 27, 1923, the Interstate Commerce Commission in the Ohio-Michigan Coal Cases ordered a widening of the differentials between the basic Ohio districts and the Inner Crescent to affected territory of 10 cents per ton, and between the Inner Crescent and Outer Crescent Districts of 5 cents per ton, which, in accordance with the commission's decision, was accomplished by reducing the Ohio rates 10 cents per ton and increasing the Outer Crescent rates 5 cents per ton. Accordingly, the rate to Cleveland being continued the same as to Toledo, was made $1.89 from the Southern Ohio Districts, $2.39 from the Kanawha, Kenova-Thacker Districts, and $2.64 from the Pocahontas, Tug River and New River Districts, which rates have since been maintained except for the reduction in the Hocking, Pom- [fol. 896] eroy and Crooksville Districts required by the Ohio Commission in its orders in Dockets 8072 and 8097, with which I have previously dealt.

One other point I desire to make in connection with this exhibit is that the commission in I. & S. 774 specifically ordered that the rate from the Pocahontas District to Canton, Ohio, should be the same as from the Pocahontas District to Cleveland, Ohio.

In connection with this exhibit 32, page 2 shows the present intrastate rate from the Pomeroy District to Lorain, Ohio (145), as being $1.89. The correct figure is $1.60.

At this point I would like to state that I have not introduced a history of rates from Eastern Ohio and Pittsburgh,

Connellsville and Fairmont Districts to Mansfield, which was due to an oversight. However, I have an exhibit of that character in the mail now and will offer it tomorrow. [fol. 897] The first of my next set of exhibits, which are in connection with distances, Exhibit No. 33, is entitled "Composite Statement of Average Distances Via All Tariff Routes, with Rates and Earnings Per Ton Mile on Bituminous Coal from all Tariff Origins in the Number 8, Cambridge, Shawnee, Hocking, Pomeroy, Crooksville, Jackson County, Middle-Coschocton and Massillon Districts to Cleveland, Lorain, Huron, Canton, Massillon, Akron and Mansfield, Ohio."

(Respondents' Exhibit No. 33, Witness Kern, received in evidence.)

This exhibit measures the existing rates (146), both state and interstate, from all of the Ohio Districts to the principal destinations involved in this proceedings from the standpoint of mileages and earnings, per ton mile. It indicates that the average distance via all tariff routes from [fol. 898] all mines and stations listed in the applicable tariffs in the Number 8 District to Cleveland, Ohio, is 159.4 miles, and that the ton mile earnings thereunder on basis of the existing interstate rate of $1.74 is 10.92 mills, whereas, on basis of the applicable intrastate rate of $1.45 applied to the same distance, the earnings are 9.21 mills, a reduction of 1.7 mills. From the Cambridge District to Cleveland—156.7 miles represents the distance from all origins and via all tariff routes taking the intrastate rate of $1.45. The distance of 161.4 miles represents the distance from the mines and via the routes over which the $1.45 rate does not now obtain.

Those routes are not through affected territory—not from the Eastern Ohio fields—but from the Southern Ohio fields the routes through affected territory are given con- [fol. 899] sideration herein.

By Mr. Ballard:

Q. May I ask also for information whether, in addition to the fact that these averages include all tariff routes (147), they likewise include all tariff origins?

A. Yes, sir, figures from the stations or mines named in the Davis Ohio Coal Tariff.

Q. By that you mean stations and mines?

A. Whatever is named in there.

Q. Whatever is named in the tariff, whether it be a station or mine?

A. That is correct.

By Mr. Herrold:

Q. Of course, Mr. Kern, there are a number of origin points shown in the Davis tariff and a number of mines also which are now obsolete. In other words, the mine has [fol. 900] been worked out or dismantled, many of them.

A. If you will be just patient until I introduce my mileages from active mines I think your objection to this can be overcome. It will be shown it does not make much difference whether you use active mines or tariff origins, you come out with about the same answer. From the Cambridge District to Cleveland the average distance from all tariff origins via all tariff routes is 214.4 miles, which on basis of the interstate rate, earns 8.12 mills per ton mile, and on basis of the intrastate rate required by the Ohio Commission earns 6.76 mills per ton mile. It does not appear necessary for me to further explain this exhibit nor to read the distances nor ton mile earnings (148) produced by the distances shown in it.

The Shawnee rates were not reduced. The only Ohio Districts which have not secured the reduced rates are the [fol. 901] Shawnee rate and the so called Jackson County District rates. This exhibit includes every origin point within the State of Ohio. The Shawnee group or Shawnee origin district is not a great coal producing district, such as the other districts. As to mines on the B. & O., for instance, there is very little coal produced there any more. It is either worked out or burned out. They have had a fire down there for twenty years. That same thing generally is true as to the Jackson District. It produces but little coal now. I have not looked to see as to whether there have been any shipments from the Shawnee District during the past year.

By Mr. Ballard:

Q. Might I ask one more question of information about these routes? Will you look at page 2 of Exhibit 33, Mr. Kern? Are the routes which enter into the last figure

(148-a) on that page all of the Wheeling & Lake Erie Routes?

[fol. 902] A. The Wheeling & Lake Erie routes are taken into account the same as everybody else's.

Q. I am trying to find out what route from Number 8 to Cleveland still carries the $1.74 rate, and my assumption was that these were Wheeling routes, where the connecting line had refused to join in the reduction. Is that correct?

A. Not exactly correct.

Q. What other classes of routes are there to which the $1.74 applies?

A. Routes via the Nickel Plate. If you will look at that exhibit, Mr. Ballard, and look at the column showing intrastate rate you will see the applicable rate via each of the routes shown on the exhibit, both state and interstate.

Q. Where it says $1.74 it enters into the 161.4 distance?

A. Yes, that is correct, and of course everything enters into the 159.4 distance.

[fol. 903] The Witness: My Exhibit No. 34 is a convenient recapitulation of the distances computed in the preceding exhibit, and shows at a glance such mileages and the earnings per ton per mile on basis of both the existing interstate rate level and the intrastate level which results from the Ohio Commission's decisions and orders.

(Respondents' Exhibit No. 34, Witness Kern, received in evidence.)

(148-b) My Exhibit No. 35 is a list of active mines on all railroads serving all of the origin districts in the state of Ohio and the distances therefrom via each tariff route to Cleveland, Lorain, Huron, Canton, Massillon, Akron and Mansfield, which are the principal destinations involved in this proceedings.

(Respondents' Exhibit No. 35, Witness Kern, received in evidence.)

As is set forth upon the title page of this exhibit, the term "Active Mines" as here employed refers to mines which have shipped bituminous coal in carloads via railroad during the period July 1, 1931 to September 15, 1932 inclusive. I obtained the lists of active mines from traffic officers of each railroad serving the said districts, and the

result, I believe, is the most up-to-date study of the distances from these Ohio origin fields to the destinations indicated that it is practical or possible to obtain. The distances in this exhibit differ from those computed in Exhibit No. 33 only on account of the different origins used, the former being all of the mines and stations named in the rate tariffs and in this only the mines produced coal during the 14½ months' period stated.

(149) There are no mines shown in the Shawnee District on that exhibit. That would indicate there was no production in the Shawnee District during that 14½ months' period. This was the most recent 14½ months' period. There were more mines active during that part of the depression in Ohio than during the boom in 1929 and back in 1927. I got the figures on that from the State of Ohio.

[fol. 904] The following exhibit is a composite of the calculations made in Exhibit No. 35.

It will be observed (150) that we show the name of the mine and its location. That location is the point from which the railroad publishes distances and consequently those distances are computed from those stations. Now in some cases that is actually the mine. In other cases it is the station nearest which the mine is located. The mine may be on a spur one mile or so beyond that.

In the initial Lake Cargo Coal Case we figured the mileage from the actual mine, tipples, and from the railroad stations and came out without any appreciable difference because where a mine happens to be 2 miles nearer the destination than the station there (151) will be another mine [fol. 905] there at that or some other station that is 2 miles further away, and consequently in the average there is no appreciable difference.

My next exhibit, No. 36, is the calculation of the average distances and earnings per ton mile from the active mines listed in the preceding exhibit via all routes over which rates are applicable, both state and interstate.

(Respondents' Exhibit No. 36, Witness Kern, received in evidence.)

The following exhibit, No. 37, is a convenient recapitulation of the distances arrived at in the detailed computation in Exhibit 36, and while it does not appear essential that I take the time of reciting any of the resulting figures, I

do desire to call attention to the fact that there is no real or substantial difference between the mileages shown on Exhibit 34 from all tariff origins and those upon this ex-
[fol. 906] hibit from active mines. In the instance of Number 8 to Cleveland the distance from all tariff origins is 159.4 and from active mines about 8 miles less. Slightly greater or lesser variations may be noted in all of the other figures shown, but in no case can the variations be termed substantial because the differences in distances are slight. The earnings per ton per mile are approximately the same on basis of both calculations.

(Respondents' Exhibit No. 37, Witness Kern, received in evidence.)

(152) My Exhibit No. 38 sets forth the calculation of average distance via all tariff routes from all tariff origins in the Freeport, Pittsburgh, Connellsville and Fairmont Districts to Cleveland, Lorain, Huron, Canton, Massillon, Akron and Mansfield, Ohio.

(Respondents' Exhibit No. 38, Witness Kern, received [fol. 907] in evidence.)

In connection with this exhibit I desire to state parenthetically the fact to which I have previously alluded namely that the only reason why the Freeport District is shown as a separate origin field is because it is so treated in the tariffs of the Bessemer & Lake Erie Railroad, which alone of the three carriers serving that producing area recognizes the group on westbound traffic, and even in this instance the rates to the territory immediately involved in this proceedings are the same as the Pittsburgh District rates. For the purpose of rate comparison therefore it is in my judgment proper to unite the Freeport and Pittsburgh Districts. This has not been done upon the exhibit, but can be accomplished by dividing into the sum of the total miles for account of the Freeport and Pittsburgh Districts the sum of the total origin points.

[fol. 908] (153) In connection with this exhibit No. 38 my attention has been called to the fact that the Pittsburgh & West Virginia Railway have, since the compilation of these distances, eliminated from their tariff a number of origin points on their line at which there are no coal mines. This

was accomplished by Supplement 43 to Pittsburgh & West Virginia Railway Tariff I. C. C. No. 225 effective October 17, 1932, some time after the distances had been computed. In order, however, that objection may not be taken to the distances in view of the changes made by the Pittsburgh & West Virginia Railway, I desire to state the effect thereon upon the distances appearing upon the exhibit.

The number of origins on the Pittsburgh & West Virginia Railway as covered by the exhibit is 18. This has been reduced to 12. The total miles from the 18 origins used, via Pittsburgh & West Virginia Railway, Pittsburgh Junction, W. & L. E. Railway, are 3039.5, the average distance to Cleveland 168.9, and the ton mile earnings upon the applicable rate of $1.55, 9.18 mills. Using the 12 origins now con- [fol. 909] tained in the tariff, the total miles are reduced to 1941.9, the average distance to 159.6, and the ton mile earnings increased to 9.71 mills. I have computed the average distances from all tariff origins on all lines in the Pittsburgh District to Cleveland via all tariff routes, to conform to these changes on the part of the Pittsburgh & West Virginia Railway, and the resulting distance is the same as that shown upon this exhibit. In other words (154), the variation in Pittsburgh & West Virginia Railway origins is insufficient to change the general average through distances to Cleveland.

In the instance of Lorain, Ohio, the effect of the amendment of the Pittsburgh & West Virginia Railway is to reduce the distance via Pittsburgh Junction W. & L. E. Railway Wellington, L. & W. V. Railway of 170.9 miles as shown on the exhibit to 161.6 miles, and to increase the ton mile earnings from 9.07 to 9.59 mills. These changes, however, do not affect the average distance from the Pittsburgh District via all tariff routes to Lorain as shown upon the exhibit.

To Huron, Ohio, the changed number of origin points reduces the distance from Pittsburgh & West Virginia Rail- [fol. 910] way mines via Pittsburgh Junction W. & L. E. Railway from 181.9, as shown on the exhibit, to 172.6 miles, and increases the ton mile earnings from 9.07 to 9.56 mills. It also has the effect of reducing the average distance via all tariff routes from all origins in the Pittsburgh District from 211.8 miles to 211.5 miles, which is a reduction of but .3 of one mile.

By Mr. Orcutt:

Q. Is that figure on page 5 of your exhibit?

Mr. Ballard: Where is that 211.8 miles, what page is that?

The Witness: Unfortunately, that was not written in, but by dividing the total origins, 219 miles, into the total miles of 46,317.6 you get 211.8 miles.

By Mr. Orcutt:

Q. On what page do those figures appear that (155) you first gave?

A. I am reading from page 5 of the exhibit.

By Mr. Paisley:

Q. You said 46,317.6 by 219 would give the figure of what?

A. 211.8.

Q. That is, before making the corrections you stated?

A. Yes, sir. When you make the correction—I don't have the resulting total miles, but the correction reduces that to 211.5, or .3 of one mile.

[fol. 911] By Mr. Ballard:

Q. Will you supply the corresponding figures for page 1 for the Pittsburgh District to Cleveland, and to Lorain on page 3?

A. I don't have that figure, but I will do it this evening and give it to you, Mr. Ballard, tomorrow morning.

Q. The arithmetic is dividing 1209 into 208755.5, isn't it?

A. Yes, sir, exactly.

By Mr. Day:

Q. That is the first step, and the second step to obtain the corrected result is to divide 1203 into the lower total?

A. Yes, sir, but you get the same answer. I did that and it does not reduce it even one-tenth of one mile.

By Mr. Ballard:

Q. Is it not true that the six Pittsburgh & West Virginia mines that were eliminated are thrown from the list of 18 mines into the list of 1209 miles, making 1209, 1215?

A. No, just the opposite, it makes 1209, 1203. We are taking (156) them out entirely because they are no longer coal originating groups in the Pittsburgh & West Virginia tariff. And my point is this, that while it does affect the Pittsburgh & West Virginia individual mileages by about 8 miles, those six origin points do not contain enough weight in the general averages to affect those averages in the least.

[fol. 912] Exhibit No. 39 is a list of the active mines in the Freeport, Pittsburgh, Connellsville and Fairmont Districts, and the computation of distances therefrom via all tariff routes, to Cleveland, Lorain, Huron, Massillon, Akron and Mansfield, Ohio. The active mines in this instance were determined in exactly the same manner as I described in the instance of the active mines in the Ohio Districts listed in Exhibit No. 35.

(Respondents' Exhibit No. 39, Witness Kern, received in evidence.)

By Mr. Keeler:

Q. Mr. Kern, in connection with the Fairmont District, have you included in that district only the area as indicated on your Exhibit No. 17, or have you taken the entire area which takes the same basis of rates as the Fairmont District proper?

A. We have included the Fairmont rate district. For instance, to Cleveland, the district which takes the rate of $1.99. Does that answer your question?

Q. So this would be different from what you show on Exhibit No. 17 (157) as being the Fairmont District?

A. I thought that one jibed with the other, but if they don't then there is a difference. I don't know of any difference, though.

By Mr. Gutheim:

Q. Before you leave Exhibit No. 39, on page 9, you have a list of seven mines shown under the heading of "Pittsburgh District, Monongahela Railway." On page 21 you seem to have the same mines, being among those headed [fol. 913] "Connellsville District, Monongahela Railway." Which is correct?

A. Connellsville it should be, Mr. Gutheim.

Q. Is that just an error in designation on Sheet 9 or has the error been carried into your figures?

A. I am afraid I will have to check that, Mr. Gutheim, and let you know.

The Witness: Exhibit No. 40 is a composite statement of the average distances from active mines listed in the preceding exhibit to the destinations indicated, which are the same points as in prior exhibits via all tariff routes individually and collectively.

(Respondents' Exhibit No. 40, Witness Kern, received in evidence.)

Here, as in the case of Ohio, I desire to call attention to the fact that the average distances from all tariff origins and those from active mines do not differ materially (158) and because thereof the ton-mile earnings are approximately alike. I emphasize the similarity of the results of these two computations only for the purpose of showing that the tariff origins are representative of the actual coal shipping points and that whether one measure the rates from the distances from active mines or all tariff origins, he must inevitably come to the same, or about the same conclusion.

Now, Mr. Gutheim, with respect to your question, at the suggestion of Mr. Burgess, I just recall that those mines on the Monongahela Railroad are in the Connellsville District as to all destinations except Mansfield, as I recall it, where they are accorded the Pittsburgh District rate. I believe the exhibit brings that out.

[fol. 914] Testimony Taken at Columbus, Ohio; December 13, 1932

Direct examination of Roy S. Kern (continued):

(160) I have with me the exhibit in connection with the historical statement of rates to Mansfield. I offer that as Exhibit No. 41.

(Respondents' Exhibit No. 41, Witness Kern, received in evidence.)

This exhibit traces the history of the rates from the Ohio No. 8, Cambridge, Middle District, Connellsville and Fairmont Districts to Mansfield, Ohio, beginning with those in effect immediately before July 1, 1917. Previously in my testimony I stated the fact that the customary basis for the Cambridge District rate was the Ohio No. 8 rate, and I call attention to the fact that such was consistently maintained until May 12, 1930, when a 2 cent reduction was made in the Cambridge rate for the (161) purpose of clearing a long and short haul violation existing in Ohio. The next disruption was that which came about effective August 20th of this year, as a result of the decision and order of the Ohio Commission in the Empire case, Docket 7036. It will also be observed from this exhibit that rates from the Pittsburgh District have, with the exception of the temporary period of disruption due to General Order 28 ad- [fol. 915] vances and the Thirteenth Section litigation in Ohio following Ex Parte 74, been maintained consistently and reflect a differential of 25 cents over No. 8. In exact terms the No. 8 rates reflect a differential of 25 cents under the basic Pittsburgh rate. The Connellsville and Fairmont differentials over Pittsburgh follow the same general lines as my previous testimony. In other words, Fairmont and Connellsville took the same rate, 15 cents over Pittsburgh up until June 25, 1918, when the General Order 28 advance was applied and a 10 cent difference resulted. At the present time Connellsville is 6 cents over Pittsburgh and Fairmont is 4 cents over Connellsville.

(162) The first of this series of exhibits relating to mileages from the southern fields, Exhibit No. 42, is a composite statement of average distances via all tariff routes with rates and earnings per ton per mile on bituminous coal from all tariff origins in the Southern Crescent Districts, namely, Kanawha, Kenova, Thacker high volatile Districts and New River, Pocahontas and Tug River Districts, those being the districts involved in the complaint of the Property Owners Committee.

The second exhibit, No. 43, is a recapitulation of the distances computed in Exhibit No. 42.

(Respondents' Exhibits Nos. 42 and 43, Witness Kern, received in evidence.)

[fol. 916] The next exhibit, No. 44, is a list of the active mines in the southern districts I have named which were determined in exactly the same manner as were the active mines in Ohio, Western Pennsylvania and Northern West Virginia, set up on exhibits that I introduced yesterday. They cover all the operations (163) which shipped coal during the fourteen and a half months' period, July 1, 1931, to September 15, 1932.

(Respondents' Exhibit No. 44, Witness Kern, received in evidence.)

Exhibit No. 45 is a composite statement of average distances via all tariff routes with rates and earning per ton per mile on bituminous coal from active mines in the southern Crescent Districts I have indicated, to the destinations in Northeastern Ohio, namely, Cleveland, Lorain, Huron, Canton, Massillon and Mansfield.

(Respondents' Exhibit No. 45, Witness Kern, received in evidence.)

Exhibit No. 46 is a recapitulation of the mileages resulting from the computation set up in Exhibits Nos. 44 and 45. Inasmuch as the calculations of distances contained in Exhibits 42 to 46 inclusive were made in exactly the same manner as I have described in the instance of distances from the Ohio Districts and from the Pittsburgh Connells-[fol. 917] ville and Fairmont Districts, it does not seem necessary that I repeat that procedure at this time.

(Respondents' Exhibit No. 46, Witness Kern, received in evidence.)

(164) The first of my tonnage exhibits, No. 47, shows for the calendar years 1922 to 1931 inclusive the bituminous coal tonnage which moved from the Ohio No. 8, Cambridge and Middle Districts, also the other districts situated in Ohio, to Cleveland, Lorain and South Lorain, Akron, Painesville, Alliance, Canton and East Canton, Massillon and Mansfield.

(Respondents' Exhibit No. 47, Witness Kern, received in evidence.)

It is introduced first to show the exceedingly large volume of coal shipped annually from Ohio Districts to destina-

tions in Northeastern Ohio. The source of the tonnages as stated upon the exhibit is the statistical reports of the Ohio Bureau of Coal Statistics, which is a carrier-maintained organization currently compiling statistics indicating the movement of bituminous coal from the districts which I have previously explained as the Ohio Districts and the Crescents into and through Central Freight Association territory. It is to be observed that (165) in the instance of Cleveland and Akron the tonnages reported cover [fol. 918] the movements to the industrial districts of those communities, and I have shown the names of the towns or cities included in each of such. In the instance of figures to Painesville and Alkali, Ohio, I have only shown those for the years 1930 and 1931 because the Ohio Bureau of Coal Statistics' reports did not give the information for previous years.

Dealing with the figures as a whole, it will be observed that the general trend of the movement of Ohio coal to Northeastern Ohio territory from 1923 to 1928 was downwardly, and that from 1928 to 1932 the movement has generally been on the increase. Some explanation of this situation seems appropriate. Report No. 25 of the Department of Industrial Relations of Ohio, entitled "Fluctuations of employment in mining and (166) quarrying in Ohio" aptly states: "Fluctuations of employment in coal mining are occasioned not alone by the prosperity of the industry itself, but also by the occurrence of labor difficulties. Disagreements occurred in the Ohio mines in 1914; 1919, 1922 and 1927. In each of these years the variation from maximum was more than 75 per cent."

Of course, what is true of fluctuations of employment in coal mining is also true of tonnage, and I therefore desire to outline the labor and other conditions affecting the production, distribution and consumption of bituminous coal [fol. 919] for the years 1922 to 1928 inclusive, as shown by the annual reports of the United States Geological Survey—Mineral Resources of the United States.

In 1922 there was a general strike of union miners of bituminous coal commencing April 1st and lasting for about five months. Added to this there were various railroad labor troubles, such as the shopmen's strike of April 1st to September 1st, the railroad clerks' strike of August, and the issuance by the Interstate Commerce Com-

mission of Service Orders 23 to 39 inclusive, which interfered with the distribution of coal through regular channels and forced the movement of coal to unnatural markets and destinations, which in turn affected the car supply through inability to get cars promptly returned, due to much longer time consumed in making the average turnaround. This also affected the carriers through congestion of unnatural gateways, which in turn had its effect on natural movements; and last the appointment of Coal Distribution Committee in August and September which regulated the supply (167), distribution and movement of coal through permits requested by them and issued by representatives of the Interstate Commerce Commission.

The year 1923 was a year unusually free from labor or other difficulties affecting the production and distribution [fol. 920] of bituminous coal, and consequently it was one of large production. This fact is well indicated in the movement of Ohio coal to the destinations covered by Exhibit No. 47.

In 1924 there was a general and substantial decrease in the production of coal because of less demand. Added to the general decrease in bituminous coal production was the fact that during 1924 the unionized fields including Ohio, first began to feel the effects of the Jacksonville wage scale in their competition with non-unionized coal produced in the so-called southern districts. These conditions are accountable for the falling off of the movement of coal from the Ohio Districts to destinations in Northeastern Ohio as shown by Exhibit No. 47.

In 1925 the production of the coal in the United States again declined, but as may be noted from this exhibit the movement of coal from Ohio mines to destinations in Northeastern Ohio increased appreciably over 1924.

The years 1926 and 1927 marked a decline in the movement of Ohio coal to the destinations being discussed, which can be attributed in a large degree to the effects of the Jacksonville Wage Agreement and the efforts of unionized mines to adjust wage (168) scales to more competitive [fol. 921] bases. Effective April 1, 1927 the Jacksonville Agreement expired and there was a general strike in the unionized fields. No settlement was ever arrived at between the miners and operators in Ohio, and gradually the

mines became non-unionized. In 1929, with improved labor conditions, the movement of Ohio coal increased. During the years 1930 and 1931 the movement of Ohio coal, as may be seen from the exhibit, decreased but sligthly, notwithstanding the depression which affected most severely the coal moving from districts outside of Ohio.

In recent years there have been considerable labor difficulties in the Ohio Districts, which in the main were not general in character but on occasions seriously affected production. Through special request made by me to the Department of Industrial Relations, division of labor statistics of the State of Ohio, I had compiled statistics reflecting the aggregate number of days lost at coal mines for various causes, including strikes and labor shortages during the calendar years 1929, 1930 and 1931.

These disclosed that in 1929 seven mines in the State of Ohio were affected by strike for an aggregate of 306 days involving 7,444 employes. Nine mines were affected by labor shortage for an aggregate of 117 days. In 1930 [fol. 922] seven mines (169) were affected by strikes for an aggregate of 96 days involving 9,050 employes. Nine mines suffered from labor shortage for an aggregate of 18 days. In 1931 26 mines were affected by strike for an aggregate of 709 days, involving 40,555 employes. Six mines suffered labor shortages for an aggregate of 39 days.

The statistics submitted to me by the Ohio State Division of Labor Statistics also showed the aggregate number of employes at mines during the three years mentioned. In 1929 there were 212,845 employes; in 1930, 239,540 employes; 1931, 236,663 employes. The fact that there were actually more men engaged in the coal mining industry in Ohio in 1931 than in 1929, notwithstanding the fact that production was, as indicated by the figures I have read, affected to a much greater degree by strikes in 1931 than in 1929 and in spite of the general business depression in 1931, indicates that the coal mining industry in Ohio is relatively better off than the industry in other states.

My next exhibit, No. 48, shows the movement of coal from the Pittsburgh, Connellsville and Fairmont, and all other Crescent Districts to the same destinations as in the preceding exhibit and for the same ten-year period.

[fol. 923] (Respondents' Exhibit No. 48, Witness Kern, received in evidence.)

In connection with this I would like leave to file as Exhibit No. 48-a the Mansfield figures when I have them typed.

(170) Exam. Trezise: I think there is no objection and that may be permitted, and the exhibit will be known as 48-a.

The Witness: The same comments which I made with respect to the authority for the figures and the destination groupings are also here applicable. I desire, however, to call attention to the last page of the exhibit which corrects the tonnage moving to Akron, Ohio in 1925, the figures appearing on the first page of the exhibit as representative of the movement to Akron in 1925 being erroneous insofar as the Fairmont District tonnage is concerned. I offer this exhibit primarily to show that the origin districts of Western Pennsylvania and Northern West Virginia, which as I have explained are aligned in a differential adjustment with the origin districts of Eastern Ohio covered in the preceding exhibit, also ship enormous tonnages of coal annually to destinations in Northeastern Ohio. It seems important to observe from this exhibit that the movement of coal from the Pittsburgh, Connellsville and Fairmont Districts, as well as from the Crescents as a whole, during 1930 and 1931 fell off considerably. These are the years in which I have pre-
[fol. 924] viously pointed out the movement of Ohio coal held up well, notwithstanding the depression.

Exhibit No. 49 combines the total tonnage figures appearing on the two preceding exhibits and shows at a glance the total movement of Ohio and Crescent coal to the important destinations in Northeastern Ohio for each of the ten years, 1922 to 1931 inclusive. (171) It, I believe, does not require further comment.

(Respondents' Exhibit No. 49, Witness Kern, received in evidence.)

The Witness: Now if the Examiner please, I would like to introduce later as Exhibit No. 49-a the Mansfield situation.

Exam. Trezise: Apparently there is no objection to it and that may be permitted, and the exhibit will be designated as 49-a.

The Witness: Exhibit No. 50 is a statement of bituminous coal tonnage moving to Cleveland, Lorain, Akron, Canton, Massillon, Painesville and Alliance, Ohio from origin districts in Southern West Virginia and Virginia involved in I. C. C. Docket 25657, complaint of the Property Owners' Committee vs. Railroads, which will be heard during the course of this hearing.

(Respondents' Exhibit No. 50, Witness Kern, received in evidence.)

[fol. 925] The exhibit covers the calendar years 1925 to 1931 inclusive and the first six months of 1932, and consists of five pages. In the instance of Painesville, Ohio, the exhibit covers only the years 1930, 1931, and the first half of 1932, while in the instances of Alliance, Mansfield and Massillon, Ohio, no figures are shown for 1925. These omissions are due to the fact that the source of the statistics, namely, the reports of the Ohio Bureau of Coal Statistics, did not include these stations prior to the (172) years covered. The purposes of this exhibit are similar to those for which previous tonnage exhibits have been introduced. It shows first that the origin districts of Southern West Virginia and Virginia annually ship large tonnages into Northeastern Ohio, and that such shipments have fallen off substantially since 1929, whereas, as I have previously noted, the shipments of coal from Ohio Districts, particularly Eastern Ohio, did not, in spite of the reduced consumption incident to the general business depression.

It is worthy of note that the High Volatile Districts covered on this exhibit shipped in 1931 less than 50 per cent of the 1929 tonnage, and that the movement from the Low Volatile Districts fell off about 40 per cent in these years.

Exhibit No. 51 is a statement of bituminous coal tonnage moving to Cleveland, Lorain, Akron, Canton, Massillon, [fol. 926] Painesville, and Alliance during the years 1922 to 1931 inclusive from the so-called Southern Ohio Districts, namely, Hocking, Pomeroy and Crooksville Districts.

(Respondents' Exhibit No. 51, Witness Kern, received in evidence.)

It is offered to show that there is a more or less substantial movement of coal from Southern Ohio into the territory involved in this proceeding and upon rates which, as I have

previously explained, were caused to be reduced by the (173) Public Utilities Commission of Ohio.

My next exhibit, No. 52, shows the movement of coal for the ten year period 1922 to 1931 from the Ohio Number 8, Cambridge and Middle Districts combined, all other Ohio Districts, the Pittsburgh, Connellsville and Fairmont Districts individually, and the balance of the movement from the Crescents, together with the percentages which each bears to the total reported tonnages.

(Respondents' Exhibit No. 52, Witness Kern, received in evidence.)

This indicates in another way the gradual decline in the movement of Ohio coal to these northeastern Ohio destinations from 1922 through 1928 and the change in the trend at that time. In this connection there is an error in the tonnages and percenatges shown on page 2 for the year 1925 to Akron, and accordingly there is attached to the exhibit a [fol. 927] correction of such. On page 4 of the exhibit there is a recapitulation of the tonnages to all of the destinations, which indicates the extent to which Ohio coal is used at these destinations. It also gives in a more satisfactory manner the trend of the movement in the decade treated. In 1922, for example, the movement of Ohio coal represented 44.1 per cent of all coal consumed at these destinations. In 1923 it rose to 46.6 per cent. From then the percentage fell off until it reached 19.1 per cent in 1928. In the ensuing years it increased to 22.7 per cent in 1929, 27.6 per cent in 1930, and 34.6 per cent in 1931, which is within ten per cent (174) of the 1922 proportion.

Exhibit No. 53 shows the movement of coal to the important destinations in northeastern Ohio, from eastern Ohio and all Ohio districts, during the first six months of 1932, which brings the tonnage data that I have previously dealt with as near down to date as available.

(Respondents' Exhibit No. 53, Witness Kern, received in evidence.)

The Witness: Exhibit No. 54 shows the movement from the Pittsburgh, Connellsville, Fairmont and other Crescent Districts for the same period.

Exhibit No. 55 combines the figures for the first half of 1932 as contained on the two preceding exhibits.

Exhibit No. 56 shows the movement of coal from the eastern Ohio Districts and of Ohio to the Youngstown rate [fol. 928] group, consisting of the Mahoning and Shenango Valleys for the period 1926 to 1931, figures prior to 1926 not being available.

Exhibit No. 57 shows the movement of coal from the Pittsburgh, Connellsville, Fairmont and other Crescent Districts to the Mahoning and Shenango Valleys for the ten year period 1922 to 1931.

Exhibit No. 58 is a combination of the two preceding exhibits and indicates the total movement of coal into the Mahoning and Shenango Valleys for each of the years covered.

Exhibit No. 59 shows the tonnage from the Number 8, Cambridge (175), Middle, and all Ohio Districts, to the Mahoning and Shenango Valleys, for the first six months of 1932.

Exhibit No. 60 shows the same information in connection with the movement from Pittsburgh, Connellsville, Fairmont, and other Crescent Districts.

(Respondents' Exhibits 54, 55, 56, 57, 58, 59 and 60, Witness Kern, received in evidence.)

The exhibits numbered 56 to 60 inclusive are submitted to indicate the very large movement of coal from all districts to the Mahoning and Shenango Valleys, where, as I have previously explained, the rate from the Pittsburgh [fol. 929] District is the key to the adjustment particularly involved in this case and the Ohio Number 8 rate is and always has been the same as Pittsburgh.

The tonnage figures appearing upon the exhibits I have thus far introduced take into account only the movement to the large cities of northeastern Ohio. There are, of course, substantial movements to smaller localities, many of which are directly involved in the Ohio rate reduction and all of which would be affected if such be extended, as it is feared will be the case, and adequate remedy be not accorded in this proceeding. As indicative of the fact that there is substantial coal moving to points other than the larger cities of Cleveland, Lorain, Akron, Painesville, Alliance, Mansfield, Canton and Youngstown (176), I offer as Exhibit No. 61 a statement showing the movement during 1929, 1931 and the first six months of 1932 from all

Ohio Districts to a number of communities in northeastern Ohio for which the detailed tonnages introduced in my previous exhibits are not available. It will be observed that the combined movement to these towns in 1931 was 316,557 tons.

(Respondents' Exhibit No. 61, Witness Kern, received in evidence.)

[fol. 930] Exhibit No. 62 shows the movement of coal from all Crescent Districts to the same small towns for 1929, 1931 and six months of 1932. Here it will be seen that in 1931 there was a movement of 874,440 tons, the larger proportion of which I am informed originated in the Pittsburgh, Connellsville and Fairmont Districts, where rates are made in a differential alignment with the rates from eastern Ohio origins.

(Respondents' Exhibit No. 62, Witness Kern, received in evidence.)

Exhibit No. 63 combines the two preceding exhibits and shows the total movement in 1929, 1931 and first six months of 1932 to these communities. In 1931 this amounted to 1,190,997 tons. In connection with these exhibits it is worthy of note that whereas from 1929 to 1931 the movement of Ohio coal increased some 78,000 tons, that from the Crescent Districts decreased (177) about 58,000 tons, indicating that the present trend of the movement to the miscellaneous destinations from Ohio is upward, and that from the Crescents it is downward.

(Respondents' Exhibit No. 63, Witness Kern, received in evidence.)

Before leaving these three exhibits I want to state the fact that this by no means includes all of the smaller communities in northeastern Ohio which consume substantial quantities of coal. These are what might be termed the [fol. 931] cities of secondary importance to the ones which I have covered by detailed tonnage exhibits.

In none of these exhibits which I have introduced are there any tonnages which moved since the Ohio reductions. All of the tonnages moved upon the interstate basis of rates as it now exists. I did not include tonnages which moved since the reductions because when these were made they

were not available. In connection with the tonnage exhibits I also want to make this further comment: Since July 1, 1922, or September 27, 1923, up until August 1st of this year, when the Ohio intrastate reductions took effect, there were no important and very few minor (178) changes made in the rate adjustment to which all of this tonnage moved.

My next exhibit, No. 64, is entitled, "Statement of Tonnages and Revenue Losses to Carriers as the Result of the Mandatory or Permissive Orders of The Public Utilities Commission of Ohio Based on 1929 Tonnage."

(Respondents' Exhibit No. 64, Witness Kern, received in evidence.)

This is a computation of the net revenue losses to carriers by reason of the reduced rates brought about by orders of the Ohio Commission, which I have heretofore explained, applied to the 1929 movement of traffic. I have selected 1929 principally because it was the last year of general business prosperity.

[fol. 932] (Mr. Ballard objected to the exhibit (178) and to all evidence offered to show that the state reductions will bring about unjust discrimination against interstate commerce or cast a revenue burden on interstate commerce, on the ground that (179) this case does not involve the question of discrimination against interstate commerce, but only the question of undue prejudice and preference as between the persons and localities in interstate commerce, on the one hand, and intrastate commerce on the other. Examiner Trezise stated that the objection would be noted and that Mr. Ballard would be allowed an objection (180) and exception, in every instance, to any evidence tending to show discrimination against interstate commerce. Mr. Martin joined in the objection and was permitted (181) to reserve an exception in the same manner.)

The Witness: This exhibit shows quite forcibly the extent to which carriers' revenues have been affected by the acts of the Ohio Commission. In the instance of the movement to Cleveland, it shows a reduction of more than $410,000, whereas the combined revenue losses are in excess of $881,000. In offering this exhibit (182) I realize that the [fol. 933] revenue reductions are probably less than the actual effect of the reduced rates will be, because to the ex-

tent that the depressed rates on Ohio intrastate traffic have or will result in the displacement of tonnage hitherto shipped upon higher interstate rates, from districts situated outside the state of Ohio, it falls short of the actual revenue diminution. The fact, however, that the resulting figure is in excess of $881,000 is to my mind sufficient to indicate the tragic effect which a continuance of these rates will have upon the carriers for whom I here speak. Exhibit No. 64 treats only of what has actually happened in Ohio, and if the carriers are to continue a competitive rate structure, such as has existed in the past and which I have described in great detail, these reductions cannot in the end be confined to origin districts in Ohio. In this connection I again call attention to I. & S. Docket 3801, here set for hearing. In order, therefore, to give some idea of the magnitude of the net revenue losses which immediately face the carriers serving the Crescent Districts, I offer

Mr. Martin (interrupting): Just for information, will you please state what you mean by net revenue losses? You [fol. 934] have used the expression at least twice. I don't see anything on the exhibit about it.

The Witness: I mean this: When you reduce a rate your reduction comes out of the carriers' net revenue because it in no sense operates to reduce transportation expense.

[fol. 935] (183) I now offer Exhibit No. 65 entitled, "Statement of Tonnage from Crescent Districts and Threatened Revenue Losses to Directly Involved Destinations Based upon the Year 1929."

(Respondents' Exhibit No. 65, Witness Kern, received in evidence.)

This exhibit was prepared with utmost conservativeness and is predicated upon the assumption that if the carriers serving the Crescent Districts are eventually forced to reduce their rates it will be in identically the same manner as have the Pittsburgh & West Virginia Railway, namely by reducing the rates to Cleveland, Lorain and Huron the same amount in cents per ton as the Ohio Number 8 rates were reduced and holding such reduced rates as minima at intermediate points. This I appreciate would result in a most indefensible adjustment in that it would accord Akron, Alliance, Canton, Massillon the same rates as

Cleveland and Lorain, notwithstanding that such have always been substantially lower, and in the instance of the Pittsburgh and Connellsville rates to Canton were fixed lower by the Interstate Commerce Commission in the case of the Canton Chamber of Commerce previously mentioned. However, even upon this most conservative basis I arrive at a revenue loss to the selected destinations of $3,185,700.16. By adding to this an estimated reduction of 29 cents per ton, which is that made in the Ohio Number 8 to Cleveland rate, to the figures shown on Exhibit No. 62 as the movement (184) from all Crescent Districts to miscellaneous destinations covered, the revenue losses [fol. 936] are increased by $269,877.48, or to in excess of three and three quarter million dollars. The mere recitation of these figures denotes the seriousness of the revenue reductions which the carriers now face.

My next Exhibit, No. 66, combines the total movement of coal reported by the Ohio Bureau of Coal Statistics for the years 1929 and 1931 from all Ohio and all Crescent Districts into and through Central Freight Association territory.

(Respondents' Exhibit No. 66, Witness Kern, received in evidence.)

This total in 1929 was 152,097,409 tons, and in 1931 102,238,846 tons. To these figures I apply a reduction of 29 cents per net ton, which is that made in the Ohio Number 8, Cambridge, Crooksville, Pomeroy and Hocking Districts to Cleveland, and arrive at revenue losses of $44,108,248.61 on basis of the 1929 shipments, and $29,649,265.34 on basis of the 1931 shipments. The total tonnages as here given are the most complete available, but they are several millions of tons shy of the full tonnage which might be affected if the Ohio intrastate reductions are carried to their logical conclusions, because a very large proportion of coal shipped to Buffalo is not reported by the Ohio Bureau of Coal Statistics and shipments to destinations east of Buffalo to and including Rochester, N. Y., are (184a) entirely omitted, although that rate adjustment is closely allied with the C. F. A. structure.

[fol. 937] In offering this computaiton I rely upon my previous testimony with respect to interrelationships in the rates on coal from the entire Appalachian fields, by

which I mean all of the Ohio and Crescent Districts which I have named into and through Central Freight Association territory. Due, as I have stated, to the commercial and competitive conditions existing throughout Central Freight Association Territory, it appears to me obvious that drastic changes, such as have been instituted by the Ohio Commission, can not be localized or confined to a small part of the territory, but must in the end extend the entire length and breadth of Central Freight Association territory and even beyond it.

My next exhibit, No. 67, consists of four pages and is entitled "Statement of rates, average distances and earnings per ton per mile on bituminous coal from active mines in the Pittsburgh, Connellsville and Fairmont Districts to selected destinations situated within the wedge or triangular territory extending from Youngstown northwest to Huron and northeast to the Buffalo District.

(Respondents' Exhibit No. 67, Witness Kern, received in evidence.)

This exhibit is submitted as the foundation for that to follow, and sets forth the routes which have been considered in constructing (185) the mileages. The destination [fol. 938] points selected include the Ohio destinations to which reductions have been made in intrastate rates and also in the Pittsburgh and West Virginia Railway Pittsburgh Districts interstate rates, and the important industrial areas both in and east of Ohio to which a common rate level now applies. If you will turn to page 4 of this exhibit I desire to correct an error in the average distances from the Pittsburgh District to Oil City. The total number of mines appearing thereon is 247, which is an error in addition, the correct figure being 221. This has the effect of changing the mileage from 147.2 to 164.5 and the earnings per ton mile from 12.50 to 11.19.

My next exhibit, No. 68, shows in composite and comparative form the average distances and earnings per ton per mile to all of the destinations dealt with in the preceding exhibit.

(Respondents' Exhibit No. 68, Witness Kern, received in evidence.)

These comparisons show quite clearly the fact that the rates from the Pittsburgh District, which in all cases ex-

cept the rates to Buffalo are base rates, reflect substantially the same earnings per ton per mile. In the instance of the rates to Buffalo the ton mile earnings are somewhat less than the other rates, which is due to the fact that the Pittsburgh to Buffalo rate is a differential rate, being made 15 cents per ton over the base Reynoldsville Dis- [fol. 939] trict rate of $2.09 per net ton. As is noted upon the exhibit the (186) average distance from the Reynoldsville District as found by the Interstate Commerce Commission in Docket 12560, Lackawanna Steel Company et al. vs. Director General as Agent—P. R. R. et al., 87 I. C. C. 383, at page 384, is 213 miles, which produces earnings of 9.81 mills per ton mile. This compares well with the other ton mile earnings for corresponding distances as set forth upon the exhibit.

In the Lackawanna Steel Company's case I have just mentioned, the Commission found *that* the entire rate adjustment of the Reynoldsville, Pittsburgh, Connellsville, Ohio Number 8 and Cambridge Districts to Buffalo to be not unreasonable. From the Ohio Number 8 and Cambridge Districts the rates are the same as Pittsburgh, which, as I have stated, is made 15 cents over Reynoldsville. Connellsville District rates in turn are 15 cents over Pittsburgh. The rates from the Pittsburgh, Connellsville and Fairmont District to Warren, Pennsylvania, appearing upon the exhibit were prescribed by the Interstate Commerce Commission in the case of The National Petroleum Association vs. Railroads, 163 I. C. C. 625. Some very interesting comparisons may be made of these rates with those obtaining intrastate in Ohio, which the Ohio Commission have caused to be reduced. It shall, however, suffice for me to state that this exhibit, when read in conjunction with the information I have given concerning rates and distances from the Ohio District, shows a con- [fol. 940] sistent level of rates obtaining interstate from Ohio origins on the one hand and from Western Pennsylvania and northern (187) West Virginia origins on the other into Northeastern Ohio and the territory east thereof to and including the Buffalo District. This consistent level has been disrupted by the low Ohio intrastate rates authorized by the State of Ohio.

On Exhibit No. 68 the correction I made with respect to the Pittsburgh District mileage to Oil City requires a

similar correction. Oil City appears upon the exhibit as the third from the last destination. The distance of 147.2 to Oil City should be corrected to read 164.5 and the ton mile earnings of 12.50 mills to read 11.19 mills.

My next exhibit, No. 69, is a tabulation of rates, distances and ton mile earnings copied from the report of the Interstate Commerce Commission in Docket 21780, Kistler Leather Company et al. vs. P. S. & N. Company et al., 169 I. C. C. 247, at pages 249 and 250. These are offered for use in comparison with the level of the Ohio intrastate rates which the Ohio Commission have caused to be reduced. They produced ton mile earnings substantially higher than the existing intrastate rates within Ohio.

(Respondents' Exhibit No. 69, Witness Kern, received in evidence.)

My next exhibit, No. 70, is a statement of rates, average distances and earnings per ton mile on bituminous coal from various Pennsylvania Railroad origin districts to indicated destinations as prescribed by the Interstate [fol. 941] Commerce Commission (188) in Docket 17745, National Petroleum Association vs. Railroads, 163 I. C. C. 625, jointly with the Public Service Commission of Pennsylvania in its Docket 6687. These rates were prescribed less than two years ago and move substantial tonnage.

(Respondents' Exhibit No. 70, Witness Kern, received in evidence.)

My next Exhibit, No. 71, shows rates and ton mile earnings from the Cumberland-Piedmont District to Hagerstown, Maryland, Waynesboro, Pennsylvania and Union Bridge, Maryland prescribed by the Interstate Commerce Commission in Docket 12726-1, 147 I. C. C., Hagerstown Chamber of Commerce vs. Western Maryland Railway et al., decided October 8, 1928, and from the P. S. & N. R. R. Reynoldsville District to Olean, New York, as prescribed by the Commission in Docket 21780, Kistler Leather Company et al. vs. P. S. & N. et al., 169 I. C. C. 247.

(Respondents' Exhibit No. 71, Witness Kern, received in evidence.)

The rates and earnings per ton per mile cited upon this exhibit are somewhat higher than the rates and ton mile

earnings for comparable distances within Ohio, or from districts related to Eastern Ohio Districts to destinations in northeastern Ohio. As an example, the distance of 137 miles from the Cumberland-Piedmont District is somewhat less than the average (189) all-route distance from the Number 8 District to Cleveland, yet the rating of $2.08 net [fol. 942] ton is 24 cents higher than the existing interstate rate from the Number 8 District to Cleveland, and 53 cents higher than the intrastate rate authorized by the State of Ohio. The distance from the Cumberland-Piedmont District to Union Bridge, Maryland of 179 miles approximates the distance from the Pittsburgh District to Cleveland. From Cumberland-Piedmont District to Union Bridge, however, the rate is $2.20 per net ton, and from the Pittsburgh District to Cleveland $1.84, a difference of 36 cents. Using the reduced rate of the Pittsburgh & West Virginia of $1.55 the difference becomes 65 cents.

Exhibit No. 72 sets forth the average distances and ton mile earnings on bituminous coal from the Clearfield, Cumberland-Piedmont and Myersdale Regions to destinations in Pennsylvania taking rates of $2.33 per gross ton, equivalent to $2.08 per net ton. Here again we find a level of rates obtaining eastbound, which is substantially higher, distance considered, than obtains in the wedge territory I have described, and very materially higher than those authorized by the State of Ohio.

(Respondents' Exhibit No. 72, Witness Kern, received in evidence.)

Exhibit No. 73 is a statement of rates, distances and mills per ton mile on bituminous coal from the Clearfield and Westmoreland (190) Regions to Elmira, New York, and points grouped therewith which were approved and/or [fol. 943] prescribed by the Interstate Commerce Commission in Dockets 18471, 18111, et al., 146 I. C. C. 59, decided July 2, 1928. Here again is displayed the fact that eastbound bituminous coal rates are substantially higher than the prevailing rates in the territory with which we are here concerned, and very materially higher than those authorized by the State of Ohio.

(Respondents' Exhibit No. 73, Witness Kern, received in evidence.)

Exhibit No. 74 is entitled, "Revenue per ton mile on bituminous coal from origin districts indicated in it to various Lake Erie ports based on Lake Cargo Coal Rates as compared with the bituminous coal track delivery rate to the Lake Erie port cities, also on basis of an assumed reduction of 29 cents per net ton in the track delivery rate.

(Respondents' Exhibit No. 74, Witness Kern, received in evidence.)

The assumed 29 cent reduction is, of course, predicated upon the fact that it represents the measure of the reduction which has been made in the Ohio intrastate rates from the Number 8, Cambridge, Crooksville, Hocking and Pomeroy Districts to Cleveland and Lorain; also from the Pittsburgh & West Virginia Railway (191) Pittsburgh District to Cleveland and Lorain. As is stated upon the exhibit, the distances appearing thereon are those which I introduced in Exhibit No. 162 at hearing in Dockets 23240 [fol. 944] and 23241, the most recent Lake Cargo Coal Rates Cases of a general nature. Of course these distances differ somewhat from those I have previously introduced covering the track delivery or commercial coal rates from corresponding districts to the ports of Cleveland and Lorain. The ton mile earnings, both in the instances of the lake cargo coal rates and the track deliveries or commercial rates are computed on basis of the lake cargo coal mileages.

Is is the intent of this exhibit to show that whereas the present interstate adjustment of track delivery and lake cargo coal rates, although they are in no sense differentially related, reflect considerable differences. Such differences have been to a great extent abolished by the reductions which have occurred in the Ohio intrastate rates, and in the event those reductions are extended, as may be anticipated, to the origin districts outside the State of Ohio, the differences between the interstate commercial and lake cargo coal rates will be diminished almost to the vanishing point. For example, the interstate adjustment of track delivery rates from the Number 8 District to Cleveland and Lorain reflects a difference of 31 cents per ton over the lake cargo coal rates. The difference between the intrastate commercial rates to these ports and the lake cargo coal rates is but 2 cents. In the instance of the Pittsburgh

[fol. 945] District the present difference is 38 (192) cents, which, if the Number 8 intrastate reductions were extended to the Pittsburgh commercial rate, would be reduced to 9 cents. This, in fact, is now the situation in the instance of the rates of The Pittsburgh & West Virginia Railway to Cleveland and Lorain. From Connellsville the difference is now 36 cents, which would be reduced to 7 cents if the commercial rate be given the Number 8 to Cleveland measure of reduction, and in the instance of Fairmont the present 33 cent difference would be reduced to 4 cents, but this does not tell the entire story. The track delivery or commercial coal rates are whole rates, in that they include the terminal delivery services at destinations, which, as I shall subsequently show, are considerable. Lake cargo coal rates on the other hand include, as is stated at page 313 of the Commission's report in Lake Cargo Coal Rates 1925, 126 I. C. C., the service—"from the mines to the raised or hump tracks beyond the classification yards at the Lake Erie ports. From these tracks the loaded cars are dropped by gravity to dumping machines at the docks. A separate charge for transferring the coal from cars to vessels is not in issue."

The charge alluded to by the Commission for transferring the coal from cars to vessels is now 8 cents per ton. If, therefore, this exhibit had added the transfer charge to the lake cargo coal rates dealt with all of the differences [fol. 946] between the track delivery or commercial rates and the lake cargo rates would have been diminished by 8 cents per ton, which, as may be noted (193), would in many instances have entirely wiped out the differences and would have resulted in numerous situations where F. O. B. vessel lake cargo charges would be from 1 to 6 cents per ton more than track delivery rates.

This exhibit does not deal with the Middle District of Ohio, which I believe warrants some comment. The lake cargo coal rate from the Middle District to Lake Erie ports, including Lorain, Huron and Cleveland, is $1.28 per net ton, which does not include the service of transferring the coal from cars to vessels. The present interstate rate from the Middle District to Cleveland and Lorain is $1.54 net ton, and the intrastate rate is 32 cents less or $1.22 which is 6 cents per ton less than the lake cargo coal rates, and if the dumping charge is added to the lake rates the intra-

state track delivery rate becomes 14 cents less than the F. O. B. vessel lake cargo coal rate.

In the case of the Massillon District, the rates of all carriers, except the Wheeling & Lake Erie Railway, which, under permissive orders of the Ohio Commission initiated the intrastate reductions, were not reduced below the Mid-
[fol. 947] dle District depressed basis. The Wheeling & Lake Erie Railway, however, did not observe this rule and consequently to the port of Huron, where the Wheeling & Lake Erie Railway operates facilities for transferring lake cargo coal from cars to vessels, their lake cargo coal rate is $1.28 net ton, 13 cents per ton higher than their intrastate commercial rate of $1.15. The difference between (194) the F. O. B. vessel rate and the intrastate commercial rate is 8 cents greater, or 21 cents. It, of course, goes without saying that situations such as these where local rates are in fact, or threaten to become lower than rates which in the case of lake cargo coal rates the Commission terms "in the nature of proportional rates," cannot long endure.

By Mr. Orcutt:

Q. Mr. Kern, digressing just a moment to go back to your Exhibits Nos. 68 to 73, inclusive, which were the ones showing comparative statements of rates, I would like to ask you whether or not substantial tonnages moved via the rates shown on these exhibits?

A. In most instances, Yes.

Q. All right, will you please proceed with your Exhibit No. 75.

A. Exhibit 75 is a statements of rates, distances and ton mile earnings on bituminous coal from various movements in Ohio, Pennsylvania and West Virginia for distances com-
[fol. 948] parable to distances from Eastern Ohio Districts to Canton and Massillon, Ohio.

(Respondents' Exhibit No. 75, Witness Kern, received in evidence.)

In Docket 7252 the Ohio Commission reduced the rates to Canton and Massillon. In the instance of the Middle and Massillon Districts, group rates were reduced from $1.01 to 80 cents per net ton, and from the Number 8 District from $1.26 to $1.08 per net ton. In individual instances point

to point (195) rates of 60 and 72 cents per net ton were prescribed.

The distances from mines in these districts, as indicated previously in my testimony and exhibits, are comparable with the distances for the rates listed upon this exhibit, but the rates it will be noted, are considerably higher than those prescribed by the Ohio Commission to Canton and Massillon. In my judgment this exhibit gives a fair picture or cross section of the level of rates for shorter hauls obtaining in the State of Ohio other than the rates prescribed by the Ohio Commission to Canton and Massillon and in Northern West Virginia and Western Pennsylvania. Based [fol. 949] upon studies made at the time the exhibit was prepared for use in connection with the hearing in Ohio Docket 7252, I can state that in most instances coal actually moves on the rates.

[fol. 950] (196) Exhibit No. 76 is a statement entitled, "Statement showing number of deliveries on each carrier serving Cleveland, Lorain, South Lorain, Canton and Massillon, also switching charges absorbed in effecting delivery of bituminous coal on connecting lines at such stations."

(Respondents' Exhibit No. 76, Witness Kern, received in evidence.)

This exhibit serves a two-fold purpose. First, it indicates the large number of points of delivery within the switching limits of some of the important coal markets of northeastern Ohio and the distribution of such delivery on the several railroads serving these cities. It is obvious that under such circumstances the amount of switching by carriers which do not road-haul the traffic to destination is considerable. Secondly, it shows the heavy absorptions which road-haul carriers must make in effecting off-line deliveries. At Cleveland, for example, the general absorption necessary is 20 cents per net ton, which is the reciprocal switching charge applicable upon bituminous coal traffic in the switching limits of that city. This is published by all lines except the Erie Railroad, which name a charge of 32 cents net ton. Of course, an traffic switched by the Erie Railroad this represents the absorption. Where other lines switch for the Erie Railroad they reciprocate by charging [fol. 951] 32 cents. Of course, where there is no direct connection between the road (197) haul carrier and the de-

livering line, intermediate switching charges are absorbed in addition. These range, as is shown upon page 2 of the statement, from $3.15 to $3.60 per car.

Exhibit No. 77 is a statement showing the total freight traffic and revenues of selected carriers, and the proportions thereof derived from bituminous coal, during the calendar years 1929, 1930, 1931 and the first six months of 1932. It indicates the well-known fact that the tonnage of bituminous coal handled by the important C. F. A. lines appearing upon the exhibit is the largest single item of revenue freight.

(Respondents' Exhibit No. 77, Witness Kern, received in evidence.)

The Witness: Page 1 of the exhibit treats only with tonnages. It shows, for example, that during the first six months of 1932 44.01 per cent of the Pennsylvania Railroad revenue freight traffic was bituminous coal, and on The New York Central the ratio of bituminous coal to all other traffic was 44.81 per cent. Notwithstanding the fact that the Erie Railroad does not originate bituminous coal traffic in substantial volume, that commodity, nevertheless represented [fol. 952] 23.2 per cent of its freight tonnages during the first half of this year.

Page 2 of the exhibit deals with the relation of revenues derived from bituminous coal traffic to total freight traffic revenues of the indicated carriers. Although, as is quite natural (198), the percentages reflecting the proportions of revenue which these lines derived from bituminous coal traffic are not as large as in the instance of tonnages, they nevertheless reflect that these carriers are dependent upon bituminous coal for a very large proportion of their revenue.

During the first six months of 1932, for example, 29.79 per cent of the P. R. R. freight traffic revenue and 22.46 per cent of the New York Central's freight traffic revenue came from bituminous coal.

My next exhibit, No. 78, is a convenient statement of the percentages which bituminous coal traffic and revenues bore to the total freight traffic and revenues of the selected carriers during the years 1929, 1930, 1931 and the first six months of 1932, which are computed on the preceding exhibit.

(Respondents' Exhibit No. 78, Witness Kern, received in evidence.)

[fol. 953] Because this exhibit contains no new information, being as stated but a tabulation in convenient form of data set forth in Exhibit No. 77, I have but one comment to make in connection therewith, and that is to call attention to the fact that the general trend of the percentages which bituminous coal tonnages and revenues bore to the total freight traffic tonnages and revenues of the selected carriers is on the increase. By this I mean that in 1929 coal represented a smaller proportion (199) of the total traffic and total freight traffic revenue of these carriers than it did in 1930, 1931 and the first half of 1932. Increases are noted in each of the years since 1929. For example, in the instance of the P. R. R. in 1929, 38 per cent of its freight traffic was bituminous coal, in 1930 40 per cent, in 1931 41.36 per cent, and the first six months of 1932 44.01 per cent. Relatively the same increased percentages are shown reflecting the ratio of bituminous coal revenue to total freight traffic revenue for the P. R. R.

In the case of all railroads appearing on the exhibit the same trend is apparent and in a number of instances the increase is much greater than that of the P. R. R., which I have used as an illustration. It seems to me that this trend is indicative that the movement of bituminous coal by railroad since the beginning of the depression has held up much better than the movement of all freight traffic, and fully dispels any idea which might be advanced in this proceeding that the bituminous coal rate structure which I have [fol. 954] throughout my testimony sought to justify as reasonable has operated to curtail the movement of bituminous coal. It warrants, I believe, the conclusion that bituminous coal rates are now low enough to continue the free movement of their traffic and to insure the continued extensive use of bituminous coal both industrially and for domestic purposes.

(200) Exam. Trezise: Mr. Orcutt, is the purpose of any of these exhibits showing the level of rates in Ohio or on interstate commerce for any purpose other than to show the maximum or minimum or maximum and minimum rates to be charged within the State of Ohio to remove discrimination against interstate commerce, if any be found to exist, or to

remove undue preference of persons and localities in intrastate commerce to the disadvantage of interstate shippers?

Mr. Orcutt: That is a rather long question. Without analyzing it carefully I would say no—no other purpose than that stated by the Examiner.

[fol. 955] Cross-examination of Witness Kern.

By Mr. Burgess:

(201) I was the principal witness for the carriers in the docket before the Ohio Commission known as Docket 7252. I have stated here that the rates from the Ohio No. 8 District and the Middle-Coshocton and from the Massillon District to Canton and Massillon as destinations have never been differentially (202) related to the producing origin groups of coal in the Inner and Outer Crescents.

There was never any fixed relationship as between the Ohio No. 8, the Middle-Coshocton and the Massillon Districts to Canton and Massillon. The order of the Ohio Commission in Docket 7252 did not directly contravene any finding, decision or order of the I. C. C. in any coal case I ever heard of. In Docket 7252 I believe I introduced exhibits showing the distances via all tariff routes from the active mines in the Middle-Coshocton, Ohio No. 8 and Massillon Districts to Canton and Massillon, known as my Exhibits 41 and 42.

The active mines I listed in my Exhibit 40 were the mines that had shipped coal during the 15 months period starting January 1, 1929 and ending March 31, 1930. (203) At the moment I recall no mileage exhibits offered by me or any witness of the defendant carriers from those districts to Canton and Massillon.

Q. Will you please turn to page 13 of Exhibit 33 in this case. Under the heading "To Canton Ohio" as a destination you show 26 origins in the B. & O. St. Clairsville No. 8 District and you show total miles 4,007.9 and an average dis-
[fol. 956] tance of 154.2 miles via the B. & O. Railroad direct. Do you know how that distance was figured?

A. According to my Exhibit No. 35, which is the list of active mines, the distance from the B. & O. St. Clairsville No. 8 District to Canton via B. & O. direct is through Bellaire.

Q. I call your attention to the fact that on page 18 of

your Exhibit No. 33 ypu have shown the total distances from some 26 origin points as 3,509 miles to Akron and the average distance 135 miles, or 19.2 miles further distant via the direct route of the B. & O. to Canton than to Akron.

A. Well, the latter works via Warwick.

As to whether I computed the miles via Warwick and East Canton to Akron, I don't know about East Canton. As to East Akron, from the information I have before me Canton is computed via Bellaire and Akron via Warwick.

(204) Q. I call your attention to the fact that on Exhibit No. 41 before the Ohio Commission in Docket 7252 you showed the distance from the then five active mines in the St. Clairsville District No. 8 on the B. & O. as 102.1 average distance to Canton, or a difference of approximately 52.1 miles.

A. It is not quite that much when you compare active mines with active mines.

Q. Now let's look at your Exhibit No. 35, where you show the active mines in the St. Clairsville No. 8 District on the B. & O. to Canton. On that exhibit you show only two active [fol. 957] mines and you show the distance to Canton as an average 146.5 miles and you show the distance to Akron as 127.3 miles via the B. & O. direct through Warwick, and through Dover and Valley Junction as 123.7 miles. Again you show Canton as further distant from mines in the St. Clairsville District on the B. & O. than is Akron.

A. Due to the difference in routes along the B. & O.

The route of the B. & O. through Warwick to Canton which I used in my exhibits 33 and 35 is the route that the B. & O. use. As to whether it is a tariff route, I can't go beyond what I said. Those distances were all compiled in my office from reports from the individual lines, as I stated in my direct testimony.

Q. I notice two routes are used in connection with Akron (205) as a destination, one via Warwick, and the other via Dover and Valley Junction. Is there not a tariff route to Canton from the St. Clairsville District on the B. & O. via Dover and Valley Junction, and isn't that route at least 46 miles shorter from every origin in the St. Clairsville District than the route via the B. & O. through Warwick and Akron, the way you have computed it to Canton?

A. I don't know about the distances, but the B. & O. apparently did not recognize that as a tariff route.

As to whether that is the only one that is shown in the tariff, the Davis Tariff, I don't know, I haven't had the tariff in front of me.

[fol. 938] Q. I want to call your attention to the same situation in connection with Exhibit 33 from the mines located on the B. & O. in the Wheeling Creek No. 8 District, wherein you showed 39 points via B. & O. direct, a total mileage of 4,731.3 miles and an average mileage of 121.3, on page 13, third item. I call your attention to page 18, where the distance is shown from the same 39 points to Akron via B. & O. direct via Warwick as 4,163 miles and the average distance of 107 miles, and via another route, B. & O. direct via Dover and Valley Junction Ohio as 4,022 miles and an average distance of 103 miles, again indicating (206) that according to the way the distances have been computed to Canton and Akron, Canton is further distant from the Wheeling Creek No. 8 mines on the B. & O. than is Akron, where the distances figure from the 39 points to Canton via Warwick and not via Dover and Valley Junction.

A. There is that difference.

I do not know what the difference in distance would be to Canton from those mines in the Wheeling Creek District on the B. & O. if the distance had been figured via Dover and Valley Junction.

As to whether there would be a considerable reduction in the distance to Canton from those points if the route of the B. & O. via Dover and Valley Junction had been used rather than the route via Warwick, it would probably diminish the distance some, but I don't know that the coal is handled that way. I don't know as a matter of fact whether any coal has ever been handled via the routes which were used in the computation of the distances to Canton from the [fol. 959] Wheeling Creek No. 8 mines on the B. & O. shown on page 13 of Exhibit No. 33, but that should be the route if the mileages were reported to me correctly. In the light of this exhibit, the route that should be used is whatever route is shown in the tariff. It is the intent of the exhibit (207) that no other routes should be used except the route of the B. & O., which is shown in the tariff.

Mr. Orcutt:

Q. Do you contend, Mr. Burgess, that there is a route via the B. & O. direct, via Dover and Valley Junction?

Mr. Burgess: I contend that the only tariff route that is in existence via the B. & O. direct is via Dover and Valley Junction and that otherwise you would have a rate of $1.08 to Akron if you had computed your distances properly here. If that was a proper tariff route, instead of $1.28 from the Ohio No. 8 District.

Mr. Orcutt: The rails from Dover to Valley Junction are Pennsylvania rails.

Mr. Burgess: I appreciate that, but the B. & O. has trackage rights.

Mr. Webber: Mr. Burgess, will you tell us what authority you have for saying we have trackage rights?

Mr. Burgess: That is my understanding. I know you have a tariff route that way. It is the only tariff route you have.

Mr. Webber: Will you also tell us what your authority is for the statement that it is the only route? What tariff are you referring to? I am merely asking so I can check [fol. 960] up. (208) Mr. Examiner, I would like to have the privilege of checking the rate that we are talking about until some time later in the day, and possibly tomorrow have one of our own witnesses give his conception of the tariff as he has found it.

Mr. Burgess: Will he also give his conception of the fact that the tariff route shown on your exhibits to Akron is not only via Warwick, but is also via Dover and Valley Junction?

Mr. Webber: All right, sir.

The Witness: And I will undertake, if you are right in this, to amend my exhibit in conformity with that mileage.

The Ohio Commission's orders in 8072 and 8097 did not require any reduction in the rates to Canton, Massillon from the Cambridge, Hocking, Crooksville or Pomeroy Districts, and the only reductions that were made were due to the long and short haul clause of the Ohio laws. (209) Those reductions appear on one of my exhibits, and of course they were not as great as at Cleveland.

My Exhibit 13 was prepared originally from information emanating, as I recall it, from the American Iron & Steel Institute. Generally it is correct, but of course there have been some abandonments of blast furnaces that might make some slight alterations. I would say that Exhibit 13 approximates the situation as it is reflected today around 99 per cent.

As to what I mean by iron and steel plants as I have [fol. 961] used them on that exhibit, as distinguished from blast furnaces, it is iron and steel plants that take the metal from blast furnaces and in some measure of degree finish them. As to whether there is an open hearth furnace at Newton Falls (210), I don't know what the Newton Falls people have there, but they have a rather important iron and steel plant. I don't know whether they have a rolling mill or finishing mill there. And Dover, I understand is practically out of the picture. I don't know whether they have a blast furnace at Niles at the present time. It, however, is in an area where there are plenty of blast furnaces.

On several of my exhibits I have shown both intrastate and interstate rates from Ohio No. 8 group to Canton and Massillon and from the Middle District to Canton and Massillon. By interstate rates in that connection (211) I mean the rates that are on file with the Interstate Commerce Commission. They are the rates that were used exclusively prior to the decision in Docket 7252. The movement was entirely within the State of Ohio and the rates were then filed both with the Interstate Commerce Commission and the State Commission. Where I refer to the interstate rates it simply means rates that were on file with the Interstate Commerce Commission and there is no intent to imply that these rates were ever used for the transportation of interstate traffic from these districts to Canton and Massillon. However, if there were an interstate shipment of coal that is the rate that would legally apply.

On my Exhibit No. 16 I show the Middle District as extending over into the State of Pennsylvania. According [fol. 962] to my list of active mines (212) there are no active mines in the Middle District in Pennsylvania, but there is a tariff origin point there. I don't know whether or not there is a mine at that point. As to whether to my knowledge there has ever been, if there wasn't I don't know why the rates were ever published.

On my Exhibit No. 17 I show the Pittsburgh District as an origin district and the line of the Bessemer & Lake Erie R. R. on the map is excluded from that district. I testified that from the tariff standpoint the mines on the line of the Bessemer & Lake Erie were treated as a separate group, Freeport, but generally speaking the rates westbound are on that basis.

(213) Q. I notice that Butler is included within the Pittsburgh District on that map on Exhibit No. 17. Now where is Butler located on the Bessemer & Lake Erie so far as the coal producing groups are concerned?

A. On the Bessemer & Lake Erie I think is from what they term their Butler-Mercer District. However, on the Pennsylvania Railroad the Pittsburgh rates apply from there.

Q. Now from Butler here on the Bessemer & Lake Erie R. R., which is located in the Butler-Mercer District, the rates are actually less than they are from the Freeport group on the Bessemer & Lake Erie to Youngstown and other destinations west of Youngstown, are they not?

A. At Youngstown they are 5 cents less, I think, than the Pittsburgh District group.

I don't know whether there are any Pennsylvania mines [fol. 963] located on The Pennsylvania Railroad at Butler (214). The B. & O. Railroad have a district which they sometimes term the Moundsville District. It lies in the Pandhandle of West Virginia. It would be a part of what is indicated here as the Pittsburgh District. It would run from Wheeling down below what I have indicated as the Pittsburgh District, down as far as Moundsville.

The rates from that district to Youngstown, the Moundsville group mines located on the B. & O., I think are slightly higher than the Pittsburgh group rate of $1.34, I don't know what the difference between them is. That is not true, however, to Canton and Massillon.

On my Exhibit No. 24 I show a present parity of rates between Ohio No. 8 and Pittsburgh origin groups to Youngstown. (215) As to whether the $1.34 rate shown from the Ohio No. 8 District to Youngstown applies from all origin points in the Ohio No. 8 group to all destinations in the Mahoning Valley, there may be some exceptions, but for all practical purposes the rate is $1.34.

As to when the rate of $1.51 from mines on the B. & O. in the Ohio No. 8 District via any route was reduced to $1.34 to Youngstown, I am not sure whether it has ever been reduced. However, I will be glad to check that fact. I do not know that as far as the Pittsburgh & West Virginia and The New York Central and The Pennsylvania and The Wheeling & Lake Erie are concerned they have got the

$1.34. The B. & O. have a peculiar situation in their own operation extending through Akron which has caused their rate to be $1.51. I don't know whether, by using another [fol. 964] routing, they have ever put the competitive rate in or not.

On Exhibits Nos. 47 and 48 I have shown the movement of Ohio coal and coal from other districts to Canton, East Canton and Massillon. I do not know exactly how much of the coal moving to those destination points from the Ohio coal producing districts is coal which is consigned to the plants of the Republic Steel Corporation, but a good deal of it. There is a lot of coal that goes into that principal industry there.

As to the coal from the districts shown on my Exhibit No. 48 (216), I don't recall the percentage of that coal going to Canton, East Canton and Massillon, that is, coal shipped to the plants of the Republic Steel Corporation, but that, too, is considerable. I do not know whether there are any companies located at those two destinations that have coking plants other than the Republic Steel Corporation. A great deal of coal that I show on my Exhibit No. 48 moving to Canton and Massillon is coking and gas coal. As to whether any of that coal is produced in any of the Ohio districts, I don't want to set myself up as an expert on what you can use coals for, but I know that gas coal is produced in Ohio and I know that some Ohio coal has been coked. I don't think it has been coked to Canton and Massillon. I do not know whether the Ohio coal has been used in the gas converters at Canton and Massillon.

(217) I referred to the fact that to the destinations shown on Exhibit 48 there had been a relatively greater falling off in the tonnage of the coal from Pittsburgh, Connellsville and Fairmont than there had been from the Ohio districts to the destinations which are shown on my Exhibit No. 47, [fol. 965] they being the same destinations which I have shown on my Exhibit 48.

Q. Do you think that that relatively greater falling off in the shipment of coal from Pittsburgh, Connellsville and Fairmont Districts to the destinations shown on Exhibit 48 is due in any degree to the condition of the iron and steel industry?

A. That probably will answer in so far as the districts of Western Pennsylvania and Northern West Virginia are

concerned, but it hardly applies to Ohio or to the districts of Southern West Virginia.

Q. Wouldn't it apply to the Pocahontas District? Isn't that a low volatile coking coal? Isn't it used for that purpose?

A. Well, yes, but it is used for a great many other purposes also.

Q. To the extent that the coals from Southern West Virginia are utilized as low volatile coking coals the depression in the steel industry which has lasted for several years now would be in part at least responsible for the falling off in the shipments to the destinations shown on Exhibit No. 48?

A. Of course, Mr. Burgess, you are asking me a lot of technical (218) questions and my answers may or may not be right, but so far as the reduction of coal used in coking plants is concerned, that is limited not so much by the depression, but by the necesisty of keeping your coking ovens in operation and how slow you can slow them up.

[fol. 966] As to whether coke ovens are closed down during periods of depression, that was the practice in the old beehive industry, but I don't understand that by-product coke ovens are worked that way. I do not know what the actual fact is at Canton and Massillon as to whether the coke ovens are working or whether they are down.

Exhibit No. 75 which I introduced in this proceeding is not identical with the exhibit that was introduced by me in Docket 7252 before the Ohio Commission and known as Exhibit No. 55 in that case. I eliminated a few rates to Orrville and Akron because those rates were reduced as a result of orders of the Ohio Commission, and I did not think it was proper to include them now, they not being the applicable rates. As to whether all the rates that are shown on my Exhibit 75 are the rates that are in effect today, there is an awful lot of rates on there and rates are sometimes changed. If there are any changes I would be glad to know them.

(219) If a rate of $1.13 to Minerva from Ohio No. 8, the route of the New York Central, is in there, then the rate shown here is the interstate rate and the intrastate rate is the Canton-Massillon rate. The $1.13 rate was in effect prior to the order of the Ohio Commission in Docket 7252 and is still on file with the Interstate Commerce Commission.

There may be a few other rates of that character in there from No. 8, but they are relatively few in comparison with the number of rates we have. Most of the rates on this exhibit are known as point to point rates, the same as were prescribed by the Ohio Commission from those two mines in the Middle and Massillon districts to Canton and/or Massillon.

[fol. 967] (220) As I recall it there is just one active mine in the Massillon District, and that is located on the Wheeling & Lake Erie. That was the situation when I testified before the Ohio Commission in Docket 7252, as far back as January 1, 1929, when I put in my active mine list in that case. There was only one mine, I believe.

By Mr. Hauxhurst:

I am asked whether the decision in the Empire Steel Corporation case by the Public Utilities Commission of Ohio resulted in equalizing the rate from the Cambridge, Crooksville, Shawnee and the Upper Hocking District to Mansfield at $1.51. There is a part of the Hocking and Crooksville districts which does take $1.51.

(221) The rates from those districts to Newark are equalized, the tarff rates, at $1.13. I don't know whether they are all the same to Mt. Vernon at $1.39. As far as Shelby is concerned, as I recall it the No. 8 rate was also in service. I think that rate is either $1.76 or $1.78.

The rates at Newark are equalized, but my point in the Empire case and in this case is that there was reason why No. 8 and Cambridge should be grouped as one at Mansfield, the same as at Cleveland or at Akron.

It is true that the rates from (222) Cambridge, Crooksville, Shawnee and the Upper Hocking are equalized at these points and they were not equalized, so far as the Cambridge district was concerned, at Mansfield, where the rate was $1.76 from the Cambridge District and $1.51 from the other districts—because Mansfield in our rate adjust-[fol. 968] ment was relatively the same as Cleveland or Akron or Canton and Massillon before the disruption. The others were part of a different adjustment.

By Mr. Waltermire:

(223) It is pointed out that in connection with page 3 of my Exhibit 4, application on behalf of the New York

Central and Pittsburgh & West Virginia Railroads for special permission to publish rates on one day's notice, I called special attention to the third paragraph, a portion of which reads: "In submitting this application your petitioners do emphatically state that the sole basis therefor is their desire to meet in their own behalf and in behalf of producers of coal on their line the existing competitive situation." I did not ask for permission to publish any lower rates from the Hocking or Crooksville districts.

I don't know whether the list furnished by Mr. Smith of the Sunday Creek Coal Company, indicating that there are 13 mines in the Hocking District and two in Crooksville, on the New York Central Railroad, is correct or not. (224) I know there are mines on the New York Central there.

When we published our tariff effective on one day's notice we did not change the rate from the Hocking or Crooksville districts.

It is pointed out that these mines on the New York Central in 1931 shipped more than 100,000 tons of coal to Cleveland. One of my exhibits indicates that.

At the time the New York Central, B. & O., and the P. & W. V. published tariffs in conformity with the special permission referred to, the rate from those two districts exceeded the rate from the No. 8 District 15 cents, to Cleveland. That had been the relative situation of the rates for [fol. 969] approximately nine or ten years, because there was no general change in freight rate in that time.

For ten years prior to 1917 the difference was but 10 cents. (225) During the period from 1917 to 1922 that difference fluctuated as rates went up and down. After the publication of the tariffs in accordance with the Special Permission, the difference in the rate to Cleveland between Hocking and Crooksville on the one hand and No. 8 District on the other was that it was increased by 29 cents, or to 44 cents. That was the situation at the time the Public Utilities Commission of Ohio instituted an investigation and in pursuance of which it promulgated its order on September 15, 1932. The rates had been in effect about eight hours by the time the Ohio Commission got out their order.

(226) Mr. Waltermire calls my attention to page 3 of

the carriers' petition filed in this case, and to passages reading, "And it may be that respondents, upon application to the Ohio Commission, will be authorized to complete the removal and restore the rate parity formerly existing. No order will be entered at this time in No. 12851." Succeeding that the petition recites: "That subsequent thereto, on, to-wit, September 27, 1923, an adjustment reflecting the differentials so prescribed was made effective and continued substantially in effect until August 1, 1932, when it was disrupted by order of the Public Utilities Commission of Ohio, and by the action of the Wheeling & Lake Erie Railway Company."

[fol. 970] On September 27, 1923 the difference in rate between the Hocking and Crooksville districts and the No. 8 district, to Cleveland, became 15 cents. (227) Prior to that for a few months it had been 19 cents.

I am asked whether or not that difference was restored to 15 cents as a result and a part of this adjustment, or whether it was independent of it. I don't understand that there was any restoration at all. (228) From July 1, 1922 to September 21, 1922 there was a rate of $1.74 in effect from the Ohio No. 8 District to Cleveland, but at that time the Ohio Commission suspended the tariff naming that rate and caused the intrastate rate to go down 4 cents, to $1.70. The situation from Hocking was that from July 1, 1922 to September 21, 1922 the Hocking rate was $1.99. There is 25 cents. Then on September 21, 1922, due to the Ohio I. & S. Docket 51, your Hocking to Toledo rate went down to $1.89, which made your 19 cents. Then on Setpember 27, 1923, as a result of the Ohio-Michigan Coal Cases, it became 15 cents, so I don't understand that that 15 cents was ever reflected in the rates prior to September 27, 1923.

From December 20, 1920 to July 1, 1922, it was $1.89 versus $2.10—that is 21 cents. The first change from the 21-cent difference was September 27, 1923. It was a temporary arrangement in there from July 1, 1922 until September, 1922.

[fol. 971] (229) If it were not for the findings and order of the Interstate Commerce Commission in the Ohio-Michigan coal cases the difference which became 15 cents on September 27, 1923 would not have resulted. The 15-cent difference was the result of the adjustment.

It is a fact that the Ohio Commission had decided but one case affecting these rates prior to the application of the (230) Wheeling for special permission to publish lower rates,—the Republic Steel Corporation case, which was decided June 30th.

By Mr. Martin:

In connection with my Exhibit 13 I stated yesterday that at Cleveland, Lorain, Canton and Massillon there are various coking plants, blast furnaces and iron and steel plants which are competitive with other coking plants, blast furnaces and iron and steel plants shown on the exhibit. (231) Among those competitive plants there are a number in the Youngstown District. I am asked whether the points at which those plants are located enjoy a rate on ex-river bituminous coal of 77 cents per ton. There is a rate published from Conway and Colona to Youngstown of 77 cents, to which is added a handling charge of 12 cents a ton for transferring the coal from river barges to rail equipment. The publishing lines are the Pennsylvania and the P. & L. E. It is an interstate rate in each case.

[fol. 972] I do not believe that there are rates in effect to all the points mentioned—Warren, Struthers, Niles, Lowellville, Hubbard and Girard—in the Youngstown District; although (232) I will be governed by the tariff, which I don't happen to have here. I know that a rate of 77 cents on this ex-river coal was established to Youngstown and points grouped therewith, including Warren. That is the rate suggested by the Commission in I. & S. Docket 3282, on page 13 of 163 I. C. C. 3.

It is there referred to as follows: "Upon full consideration of the facts of record we are of the opinion that a reasonable maximum rail rate on this ex-river coal would be 77 cents to Youngstown and points grouped therewith, including Warren, Ohio."

My exhibit 13 shows either coke ovens, blast furnaces or iron and steel plants at (233) Youngstown and Warren, Struthers, Niles, Lowellville, and Hubbard, Ohio. I don't know about Girard.

Following the decision of the Interstate Commerce Commission in I. & S. Docket 3619, it is a fact that there were established ex-river rates of $1.02 to Canton and Massillon from Conway and from points on the Ohio River between

Steubenville and Bridgeport by The Pennsylvania, B. & O. and Wheeling & Lake Erie Railroad. Those rates are in effect today. The difference between that rate of $1.02 to Canton and Massillon and the rate of 77 cents to Youngstown is 25 cents, which is equal to the differential between the Pittsburgh all-rail (234) rate to Youngstown on the one hand and the Pittsburgh all-rail rate to Canton and Massillon on the other hand.

[fol. 973] Mr. Orcutt: Mr. Examiner, I thought perhaps Mr. Martin would not continue this examination for any great length of time and it would not be necessary to object to it, but apparently he is going to prolong it and I desire to object on two grounds: First, that it is not proper cross-examination. The witness on direct testimony did not touch upon ex-river rates in any way and consequently it is a decidedly improper comparison to compare all-rail rates with rates in the nature of a proportional rate. That is what Mr. Martin is attempting to do.

Mr. Martin: Mr. Examiner, in the first place these rates are a part of the interstate rate structure which has been testified to here by the witness for the last day and a half.

Exam. Trezise: He has testified about these rates?

Mr. Martin: He has testified about interstate rates.

Exam. Trezise: But not about these rates?

Mr. Martin: Not about these ex-river rates, but they are a part of the interstate rate structure on coal. In the second place, replying to Mr. Orcutt's second point I wish to call attention (235) to the fact that one of their latest exhibits is a comparison between the $1.45 rate and the Lake Cargo coal rates, which of course are in the nature of proportional rates, just as the ex-river coal rates are in the nature of proportional rates.

[fol. 974] I have perhaps three or four more questions when my examination will be concluded and I trust I will be permitted to continue.

Exam. Trezise: The second objection goes only to the weight of the evidence. The first objection seems to have some foundation unless you are trying to lay the ground to ask the witness some questions, are you?

Mr. Martin: All I am trying to show by this witness's testimony is that there is a body of interstate rates on coal into this same territory, Northeastern Ohio, specifically to

Canton, Massillon, Cleveland and Lorain, which are on a lower basis than the rates which he has thus far testified to from Pittsburgh, Fairmont, Connellsville and the other districts outside of Ohio, which is, I think, a fair thing for me to show in view of the fact that he has shown but one side of the picture.

Exam. Trezise: I think we will accept evidence of that kind. You are cross-examining him on the evidence that he gave here by pointing out or trying to point out that there is other evidence that he has taken into consideration in drawing the conclusions he has. Is that the point?

Mr. Martin: Yes, your Honor, and that he has not shown the complete picture of the interstate rates on coal, which I understood (236) he purported to show.

Exam. Trezise: I think that is not going outside of his examination, and I think we will allow him to testify as to [fol. 975] other rates that might reflect upon the testimony that he has given.

Mr. Orcutt: Then I will ask that Mr. Martin at the same time be compelled to take the through transportation charge, that is, from the mine to destination, including the water haul and the lifting charge and the rail charge if he is attempting to compare that movement with the railroad and not just take the portion that he wants.

Exam. Trezise: That goes, as the Examiner understands it, to the weight of this evidence as to whether or not it is a proper comparison. If you show what it is I think the Commission can draw its conclusion. If there are other facts you want to bring out, let's bring them out and not argue. Go on, Mr. Martin.

By Mr. Martin:

Q. If I recall my last question, Mr. Kern, it was as to whether or not that about the same time these carriers, the Pittsburgh & Lake Erie, the Pennsylvania, the B.&O., and the Wheeling & Lake Erie Railroad published rates from their ports at Colona and Conway and points between Steubenville and Bridgeport, all on the Ohio River to Cleveland and Lorain of $1.27 per ton?

A. Those lines met the rate that the Wheeling & Lake Erie published as a result of the suggestions of the Interstate Commerce Commission in I&S Docket 3619.

[fol. 976] The $1.27 rate is 50 cents higher than the rate approved (237) by the Commission in I. & S. 3282 for application to Youngstown from the ex-river ports.

(238) I have not been testifying to the differential but to the relationship, Cleveland over Youngstown, on the all-rail rates from the Pittsburgh District. Cleveland over Youngstown is a difference and not a differential.

By Mr. Gutheim:

(240) I do not know whether or not the Ohio Supreme Court sustained the order of the Ohio Commission in the Empire case. Mr. Herrold states that the case is pending. The stay of the Commission's order was denied, as I testified. We took to the Ohio Supreme Court the Wheeling's rates to Cleveland and thereabouts which were permitted to become effective. I don't understand that there has been any action of the court with respect to those rates.

(241) We tried to get a suspension with respect to their level and could not. Beyond that we did nothing but fulfill the statutory requirement to bring the issue into the Supreme Court. I don't know whether the State Supreme Court declined to review those rates or whether, whatever the action of the court, we went back to the Ohio Commission for a ruling with respect to their level or their merit otherwise. I don't know anything about anything like that.

(242) On my exhibit 18, the $2.39 rate to a blanket destination, the application of which I there show, applies also [fol. 977] from eastern Kentucky, generally on the C. & O., L. & N. and Southern Railway (243). That part of the $2.39 destination blanket which is west of the Sandusky-Galion line in the area shown on my map, and also the rate to Canton from the $2.64 group, is prescribed by the Commission in I. & S. 774, and that automatically fixed the $2.39 group rate there. That $2.39 rate was not prescribed by the Commission to destination territory other than that covered by the $1.89 rate from Hocking, shown on my Exhibit 21—except the Canton situation that I explained. I do not know whether that rate was prescribed because of Fourth Section influences.

It is not a fact that all the routes from the southern districts to the $2.39 destination group make through either Columbus or Cincinnati (244). The extent to which that is not a fact can be answered if you will consult my exhibit

on mileages. Every route I had in mind is shown on the exhibits, particularly the route via Vances C. & O. and B. & O.

The Interstate Commerce Commission recognized the carriers' basis whereby the Hocking to Toledo rate was made the same as the Pittsburgh to Cleveland rate. That is in I. & S. 774.

With respect to my selection of certain mines as active mines, I computed distances from active mines in the Lake Cargo Coal Rate cases. At that time we used, I think, a period of fifteen months.

[fol. 978] Certainly all shippers collectively (245) know whether or not mines are active within a given recent period. Perhaps an individual shipper does not. They are running the mine. They ought to know that. I know of no available government figures that show what mines are active within a recent period. To my knowledge the railroads do not publish any figures showing such information. As to whether my Exhibits 34 to 37 are comparable as summaries on the situation there shown from the Ohio Districts, they simply tabulate the results of the two mileage computations I put in, one being the tariff origins and the other active mines. Exhibits 38 and 40 are the summaries themselves.

Q. You said with respect to your Exhibit 42 that you have covered only the distances from districts represented by the Property Owners' Committee. What other districts are there from which the same rates apply?

(246) I stated a moment ago the Eastern Kentucky districts—eastern Kentucky as a whole. Part of Virginia is in here, but some of them, the origins are not. Northeastern Tennessee are omitted. They are not covered by the Property Owners' Committee. The Property Owners' Committee case specifically indicates all of the districts covered by name.

My exhibits showing the tonnage movement are exhibits of figures that cover all bituminous coal. I make no distinction between steam and domestic or gas and metal-[fol. 979] lurgical. As to whether our domestic movement is largely a seasonal movement, that is something I would have to answer either yes or no. I buy my coal usually in the off season.

(247) With respect to the revenue losses I computed, to

the extent that tonnage might shift from western Pennsylvania to Ohio mines, we would have, under the present situation, an additional loss of 29 cents per ton if we enjoyed the business from Ohio.

My exhibit 68 is an all-route proposition and exhibit 69 I copied from the decision of the Interstate Commerce Commission. My offhand judgment is that there is only one route to figure the distance via. Naturally, if there is only one, it is the short route. It is probably true that the distances are figured in exhibit 68 from active mines and in exhibit 69 from all mines.

(248) I show an average distance on exhibit No. 68 to these destinations and that average distance covers all the tariff routes, as shown in the preceding exhibit, No. 67. Exhibit No. 67 shows all of the tariff groups and we only have one route for each origin line, as I recall it. As to what is the situation with respect to my exhibit No. 70 and whether the distances there shown are the short route distances, they are all single-line routes and consequently there would only be one figure.

"Q. And this comparison of the rates here in issue with the eastbound rate structure, have you said anything about [fol. 980] the conditions of transportation? That is, one a fair indication of what the other should be?

A. No, sir, I did not testify on transportation conditions.

Q. You don't want to do that?

A. No, sir."

I understand that these eastbound rates are all before the Commission at the moment.

(249) The calculations covered by my exhibit 76 on switching absorptions cover the month of August, 1931.

The tonnage shown on my exhibit 77 is the tonnage of freight originated and coal originated on all coal and freight carried.

[fol. 981] With respect to the ex-river rates, not all the mines in the districts from which ex-river coal comes are located on the rivers. Numerically the great preponderance of the mines are located inland. I would say that as the ex-river rates permit cheaper transportation, that cheaper transportation is available exclusively to the mines located on the river.

In so far as the Massillon, Middle-Coshocton and No. 8

and Cambridge Districts are concerned, the reduced rates are applicable from all of the mines in those districts (250), but in so far as the Hocking and Pomeroy Districts are concerned they are applicable from only a part of the mines.

[fol. 982] Testimony Taken at Columbus, Ohio, December 14, 1932

Cross-examination of Witness Kern (continued).

By Mr. Brown:

(252) On my exhibit 76, the 1,462 deliveries in the Cleveland District are listed in the switching tariffs of the railroads applicable at Cleveland. They are the private sidetracks within the switching limits. The vast majority of them handle coal. In a town the size of Cleveland, with big industries, there is some concentration of deliveries of coal. There is more reciprocal switching done in Cleveland, perhaps, than in any other city of its size in the United States.

By Mr. Tefft:

(253) The vast majority of the routes on the C. & O. Railway and the New York Central Railway to northeastern Ohio extend in part through affected territory. Normally the preponderance of traffic moves over one or more of those routes. The single line hauls of the originating carriers in both instances extend through affected territory to Cleveland and Lorain and other points that they serve. [fol. 983] (254) If an unrouted car of coal were delivered to New York Central Railroad in the Hocking District, it would move to Cleveland either in connection with the Big Four or via its line through Toledo.

I testified that in my opinion there is no justification for the difference in rates from the southern Ohio mines to Cleveland than there was to Toledo.

By Mr. Burgess:

(255) Q. May I ask one more question on your Exhibit 64, Mr. Kern, on page 2, under the heading, "To Massillon,

Ohio." You show a rate reduction from the Massillon District to Massillon of 41 cents. Now wasn't the rate in effect prior to the order of the Public Utilities Commission of Ohio in Docket 7252 64 cents from the only active mine in the Massillon District to Massillon, instead of $1.01? In other words, the revenue reduction would be 4 cents on 6,087 tons of coal instead of 41 cents?

A. I debated that situation in my mind, Mr. Burgess, and I put it down this way because I thought it was as near correct as anything. If you, for your own purposes, want to change it to a 4 cent reduction I don't think there would be any serious objection to it.

Q. As a matter of fact, of course, the rate from the only [fol. 984] mine from which coal moved was 64 cents, the tariff rate, 64 cents?

A. The probabilities are that that is correct.

By Mr. Keeler:

Referring to my Exhibit 17, at the time the map was drawn, I checked quite carefully the limitations of the Fairmont District to ascertain whether or not it includes all of the territory that generally takes the Fairmont rate. I did that for the reason that I long had an impression that it should have included the station Kingwood on the B. & O., but the B. & O. people told me that the outlines of that map were correct as representative of the Fairmont District.

(256) There are various sub-districts which take the Fairmont rate—Fairmont No. 1, Fairmont No. 2, Monongah, Clarksburg and Short Line and Opekiska, and south of the Clarksburg District is located the Upshire District—and Belington, and the Junior, and Roaring Creek. The latter four groups take the Fairmont No. 1 rates into affected territory, as a part of the Inner Crescent.

Q. These questions are leading up to the question that I really want an answer on the record as to whether in compiling your list of active mines and the stations and mines as set forth in other exhibits you have included everything on the B. & O. that takes the Fairmont rates as applying from the B. & O. points in the Fairmont No. 1 District?

[fol. 985] (257) A. The intent was to take everything on the B. & O. Railroad which took $1.99 to Cleveland. In so

far as other stations are concerned that means that it included more mines than took the Fairmont No. 1 rate to these points.

On my exhibit 23, the historical statement, on April 24, 1920, in connection with Docket 8899, the differential Fairmont over Connellsville became 19 cents (258). The figure 9 cents should be corrected to 19. I thought that had been done on all the copies of the exhibits.

On the same exhibit, the next to the last line, it shows "February 15, 1926 adjustment." Under Massillon it shows that prior to that adjustment Fairmont took 9 cents over Connellsville, but with that adjustment the rates became 22 cents over. That was an adjustment which placed Massillon on a parity with Canton from the Pittsburgh and Connellsville Districts, which parity had existed prior to the decision of the Commission in the Canton Chamber of Commerce Case and was disrupted for a short interval and then restored by reducing the Massillon to the commission-fixed Canton basis.

The adjustment was not carried to the mines on the Monongahela Railroad. The Fairmont rates were not touched as a result of the Canton Chamber of Commerce case. They were not in that case. (259) To Massillon, the [fol. 986] rate on the B. & O. Fairmont No. 1 mines is the same as the Connellsville rate. It is only the Monongahela mines that took the $1.87 rate.

Mr. Keeler calls my attention to page 3 of Exhibit 33, distances from the Cambridge District to Cleveland. It shows five routes via the B. & O. Railroad and then dittoes the B. & O. again and shows a route via P. R. R. direct. The obvious intent of that is to show the P. R. R. route from P. R. R. mines.

By Mr. Herrold:

On my exhibit 74 where I show the origin district down near the bottom I show the average distance from Connellsville to Lorain as 285.3 miles. Underneath I show the distance from Fairmont District to the same destination as 253.5 miles. I don't think there is necessarily anything wrong with that mileage. The Connellsville District is not closer to Lorain than the (260) Fairmont, via the B. & O. Railroad. These are Lake Cargo coal routes and the B. & O. is the only railroad which publishes Fairmont or Connells-

ville district rates to Lorain; consequently these Lake Cargo distances represent the B. & O. distances, and no other, from Fairmont and Connellsville.

It is suggested by Mr. Herrold that on my Exhibit 75, where I have shown a miscellaneous lot of rates from vari- [fol. 987] ous points of origin to various destinations, the idea was that I made them selected point to point rates out of the group rates, and that in doing so I selected a group rate from the short mileage in the group instead of taking the rate from the average or from the more distant points of origin in the groups. That is not true.

(261) On page 2 I shows rates from the Crooksville District to Thurston, Baltimore, Millers Siding and Rushville —the rate is 90 cents and the distances range from 36.4 miles to 44.9 miles. It is true that the 90-cent rate to these points applies also from the Hocking District, which adjoins the Crooksville District immediately to the south. I don't know how long the rate of 90 cents from the Crooksville and Hocking Districts has been on a parity, but it has been a long time. Crooksville and Hocking Districts are considered as one origin group, and when you average them you get about 47 miles. I have shown distances there up to 45 miles, and I don't think you can inflate it very much, at least enough to reduce the ton mile earnings very much.

[fol. 988] (262) It is suggested by Mr. Herrold, that in my testimony in the previous case I showed the average from the Hocking District over 50 miles. Also that the distance from Chauncey is 55 miles to Baltimore. But if you group the Hocking and Crooksville Districts you don't get it that high, and that is the way the Public Utilities Commission of Ohio made the rate. It does go higher than 44.9 miles, but I still hold that that is the shortest distance you could have figured on that 90 cent rate. I testified on my direct examination that before these comparisons were put in to the Canton-Massillon case we made an investigation (263) and found that in the majority of instances there were movements on these rates, and incidentally this is practically the same exhibit as the Ohio Commission praised in the Baltimore case as typifying the level of short haul rates.

It is pointed out that on page 2 a rate is shown of $1.01 for .4 of a mile; other distances 20 miles, 19 miles, 18 miles,

clear down to .4 of a mile. Evidently the railroad that publishes that rate feels it is a proper rate.

(264) A rate of 76 cents on sheet 1, Jacksonville to Doty, for .8 of a mile, having been published as a proper rate for that distance, I think is a proper minimum rate. Initially in Ohio it was for a distance up to 20 miles, and in the absence of peculiar circumstances I don't think you should [fol. 989] go lower than that.

I don't know anything about the conditions under which the rate of 60 cents per ton was fixed for a distance of ten miles in decisions of the Commission in the Thirteenth Section cases in Illinois. I have read the decision.

The word "reciprocal" in connection with so-called reciprocal switching charges is not an offset proposition. The word is really a misnomer. In the City of Cleveland the New York Central Railroad normally switches about 25,000 cars of coal a year, which is many times the number of cars that that railroad hauls into Cleveland (266). To the extent that they get 20 cents a ton on more cars than they switch than they road haul, it is costing somebody that 20 or 32 cents, whatever it is, and to that extent that is no such thing as real reciprocity in reciprocal switching. I speak of Cleveland because that is the one I am most familiar with, but the same thing is common practically everywhere, because only certain railroads originate bituminous coal and participate in the movement to any given market.

In the case of the movement of coal into Canton, the railroads touch the principal industries there direct without any reciprocal switching, but not necessarily the railroads which originate the traffc, which normally participate in the absorption of the switching.

[fol. 990] Q. You testified, Mr. Kern, something relative to an informal conference held between representatives of the carriers and the Ohio Commission back in August, 1923. Did you attend that conference?

A. No, sir.

Mr. Herrold: Mr. Examiner, I move that his testimony be stricken from the record with reference to informal conferences before the Public Utilities Commission of Ohio where he has not attended. (267) It can only be hearsay if he was not in attendance.

Mr. Orcutt: Mr. Examiner, the testimony in connection

with that conference was offered before the Ohio Commission in the Empire Steel Case and was offered by a man who was in attendance at the conference. The commission itself was in attendance and no exceptions were taken to that testimony. Mr. Kern heard that testimony and he knows of the facts about which he has here testified, and so does Mr. Herrold. Why attempt to exclude something on a flimsy objection like that? If Mr. Herrold can show they are not the facts, all right, but he knows they are the facts. I don't blame him for wanting them excluded.

Mr. Herrold: I know that there was a conference, but I want an opportunity to show that the informal conferences certainly did not and could not have any lawful effect.

[fol. 991] Mr. Orcutt: You can show that, but the proper way is not to show it by objecting to the direct testimony of somebody else.

Exam. Trezise: Would it meet your purpose to show that and allow the testimony to stand, or do you want a ruling on it?

Mr. Herrold: Yes, I would like to have a ruling.

Exam. Trezise: I think we will let the testimony stand.

Mr. Herrold: I would like to, then, in that connection, put into the record what this commission said with reference to that particular informal conference (268).

Mr. Orcutt: Now is this being put in by way of affirmative testimony of the Ohio Commission? If so, I suggest it be withheld until we finish our case.

Mr. Herrold: This is exactly what the Ohio Commission said in one of the exhibits that your witness has introduced in this case.

Mr. Orcutt: Mr. Examiner, I submit this is not the proper time for the Ohio Commission to put in any affirmative evidence on their own behalf.

Exam. Trezise: You make no point of putting it in now?

Mr. Herrold: I am willing to hold it. This simply answers the question the carriers raised here as to what the [fol. 992] Ohio Commission did, and the Ohio Commission answered the question and analyzed the situation.

Exam. Trezise: Wouldn't it be proper for you to put that in a little later and go on with your cross examination?

Mr. Herrold: That will be satisfactory to me, that is all.

[fol. 993] By Mr. Reed:

My exhibit 32 shows a historical statement of rates on bituminous coal in cents per ton from the Hocking, Pomeroy and Crooksville Districts and also certain points in the Inner Crescent, and also the Outer Crescent to certain designated destinations, which are the points involved in the Thirteenth Section proceedings.

(269) Q. Now from this exhibit it appears, does it not, that from January 1, 1910 up until September 29, 1932 the Pomeroy District had the same rates as the Hocking and Crooksville Districts to all of these destinations with the exception of Mansfield?

A. If you will eliminate Crooksville I will answer your question yes. As far as the exhibit is concerned, Crooksville has taken the same rate as Pomeroy, but there are a lot of other rates from the Crooksville District that this exhibit can not show, so that to be real truthful Hocking and Pomeroy have always taken the same rate as displayed by this exhibit, but there are instances where Crooksville takes lower rates.

It is true that the exhibit does not show any differences between the Crooksville and Pomeroy and Hocking rates, but there are instances where to Cleveland the Crooksville rate is $1.76 via other routes,—via Wheeling & Lake Erie and the Pennsylvania is lower, and I have here used the New York Central.

[fol. 994] I agree that covering substantially the same period the Pomeroy rate has been the same as the Hocking rate to Toledo destinations. Crooksville to Toledo, I think, takes 10 cents under Hocking, under the decision of the Interstate Commerce Commission. (270) It has participated in the same rate as the Hocking to Toledo during substantially the same period of time. There were some periods, I think, when there was an intrastate rate from the Hocking which did not apply all the time from Pomeroy District. I don't know how long it was, but one was 85 cents and one was $1.00 as a result of decisions of the Ohio Commission which were cleared up in I. & S. 774.

The Hocking and Pomeroy fields generally take the same rates. I would not say they have been treated as substantially the same origin fields, but they have been accorded the

same rates. We have always treated them as different origin fields in the tariff.

Q. So that in the proceeding of the Ohio Commission, Docket 8097, the effect of their order was to restore the Pomeroy rate to that (271) of the Hocking District to the points named?

A. It may have been the effect, but the Ohio Commission did not say that. It said that they eliminated discrimination and preference in favor of the No. 8 District. They did [fol. 995] not say anything about Hocking, as I recall it.

Referring to my exhibit, it shows on page 1, referring to the Cleveland destinations, that on September 29, 1932 the rate from the Hocking and Crooksville Districts to Cleveland became $1.60, because if you deduct the same amount from the same figure you get the same answer.

The rate from the Pomeroy District still remains $1.89 under September 29, 1932. By virtue of the order of October 28, 1932 the Pomeroy rate became $1.60, which is the same rate in effect from the Hocking District and Crooksville District. The effect was to restore that parity among those three fields; but so far as the commission's decision was concerned, (272) that was a pure accident. They were aligning the rate on a fictitious differential with No. 8. The commission's order was to the effect that certain carriers were ordered to remove discrimination. I mentioned the Hocking. In the Pomeroy case the Hocking was not mentioned.

Q. Referring to your Exhibit No. 35, and more specifically to page 15, I believe you testified that all the mines in Ohio making shipments to the Cleveland terminal points were affected by the various reductions which are the subject of this proceeding, with the exception of certain mines in the Hocking and Pomeroy Districts?

[fol. 996] A. You are referring now to the mines of the C. & O. Railway in those districts? My testimony was that the Ohio Commission had covered all the districts of Ohio save only Jackson County and Shawnee. But in so far as the Hocking and Pomeroy Districts are concerned only such of those mines as are served by the New York Central were required to maintain the reduced rates. All of the mines in those districts had the advantage of the reduced rates except those mines located on the C. & O. Railway.

(273) Referring to page 15 of Exhibit 35, I have made the

statement that a number of the routes shown to various destination points, including Cleveland, would necessarily go through affected territory. For the Pomeroy District to have a rate to Cleveland originating on the C. & O. without going through affected territory, they would have to create a new route, I am afraid.

Via Pennsylvania, through affected territory through Columbus, would be an open route. They could probably work via Columbus and P. R. R., but that, I believe, is the only one of the routes listed on that page to Cleveland that would not traverse affected territory.

That route which is set forth in my exhibit as the fifth one under routes and distances is via the C. & O. for a mileage of 301 miles.

The shortest tariff route between Pomeroy District and Cleveland that I show on the exhibit, via C. & O., is Columbus and the Big Four—269.6 miles. (274) That goes through affected territory. It does not go very far, from Galion to Shelby Junction. I don't know the approximate distance of [fol. 997] that. The Big Four between Cincinnati and Cleveland goes through affected territory between Galion and Shelby Junction. It does not traverse much of affected territory. I don't know the exact mileage.

(275) Referring to my Exhibit 75, page 3, I am asked if there is a published tariff on coal from Chauncey, into Pomeroy. I don't know where we got it if it is not in the tariff. These rates were all taken out of the tariff.

I am asked why I include as a comparable rate a rate from Chauncey into the heart of the Pomeroy Coal district, where it is said coal would not move at $1.13 a ton. I have no explanation for that, only I do not take it for granted that simply because Pomeroy is in a coal district nobody else can ship there. Canton is in a coal district, and so are Massillon and Pittsburgh.

[fol. 998] H. A. Cochran was called as a witness, and having been duly sworn, testified as follows:

Direct examination.

By Mr. Webber:

(276) I am coal traffic manager of the Baltimore & Ohio

Railroad, which position I have held a little over nine years. (277) I have been in the Coal Traffic Department of the Baltimore & Ohio about 34 years. Treating the Shawnee District as a part of the Hocking field, which it really is, our road serves all of the districts of the State of Ohio except Pomeroy. Outside of Ohio, but shipping coal into northeastern Ohio, the Baltimore & Ohio serves the Pittsburgh, Connellsville, Reynoldsville and Meyersdale fields in Pennsylvania, the Fairmont and Moundsville fields in Northern West Virginia, the Cumberland-Piedmont field in Northern West Virginia and Maryland, the Gauley (former Coal & Coke Railway) field in what might be called Central West Virginia as distinguished from Northern West Virginia, or Southern West Virginia.

Our railroad serves directly Canton, Massillon, Mansfield, Cleveland, Lorain and Akron. In connection with other roads the B. & O. serves practically (278) every point in the northeastern Ohio field. We transport coal to other territory outside of northeastern Ohio. Coal originating on the B. & O. is transported by it and connections to all parts of Central Freight Association Territory, Trunk Line and New England territories and Canada.

I have figures showing the tonnage moving from the Ohio Districts and from districts which we serve in other states [fol. 999] to the territory in northeastern Ohio involved in this proceeding. The tonnage originating on the B. & O. and short line connections for destinations in northeastern Ohio is embraced in the exhibits submitted by Witness Kern, Nos. 47 to 66 inclusive. B. & O. originated tonnage from the Number 8, Cambridge and Middle Districts in Ohio and from the Pittsburgh, Connellsville and Fairmont fields to the Cleveland District, Lorain and South Lorain, Akron District, Canton and East Canton and Massillon amounted in 1929 to 2,725,575 tons, and in 1931 to 1,727,229 tons. That tonnage moved from Number 8, Cambridge and Middle Districts in Ohio to the five destinations that I mentioned—Cleveland, Lorain, Akron, Canton, and Massillon.

(279) Those figures also include the Pittsburgh, Connellsville and Fairmont Districts. I have just given the Ohio districts and the destinations. They also include the tonnage originated on the Baltimore & Ohio and its short feeder lines in the Pittsburgh, Connellsville and Fairmont Districts. Of course the B. & O. originated some tonnage

from other fields than these, but these are the principal ones from which B. & O. coal moves to northeastern Ohio. Those tonnage figures I gave cover coal from Ohio No. 8, Cambridge, Middle Districts, Pittsburgh, Connellsville and Fairmont Districts.

[fol. 1000] I did not bring along the figures segregated to give the percentages moving from the Ohio Districts via the B. & O. I calculated the revenue results which I am just about to give you from the Ohio fields and others.

(280) Based on the 1929 tonnage the reductions that have been made in the Ohio intrastate rates would reduce the revenue of the carriers on coal originated by the B. & O. for these five places by $235,000. If interstate rates from the fields mentioned be reduced by the same amount as the number 8 rates to these destinations have been reduced, the revenue of the carriers on coal originated by the Baltimore & Ohio Railroad would be reduced by approximately $500,000 more, making the total reduction over $735,000. Based on 1931 tonnage the reductions in revenue of the carriers from the same fields and to the same points would be, on intrastate shipments, about $226,000, and on interstate shipments about $215,000, making the total reduction in revenue on B. & O. coal from the six districts to the five destinations over $440,000.

This of course does not represent the total reduction in revenue on coal originated on the B. & O. for northeastern Ohio, as there are many miscellaneous points to which the tonnage in the aggregate would be considerable, but not included in the tonnage shown above to specific points or groups.

I am familiar with the competition among coal producers in the various fields served by our road. (281) Operators in the Pittsburgh, Connellsville, Fairmont, Moundsville [fol. 1001] and Reynoldsville Districts are in competition with operators in the Ohio districts. Industries located at Cleveland, Lorain, Akron, Canton and Massillon, particularly those in the iron and steel business, are in competition with similar industries at Youngstown, Erie, Buffalo, Toledo, Detroit, and elsewhere.

If the Ohio intrastate rates remain as at present, in my judgment the effect on coal operators in Western Pennsylvania and Northern West Virginia would be quite serious. They all compete in northeastern Ohio with Ohio op-

erators. They all pay higher freight rates than the Ohio shippers. The increased spread brought about by the reductions in Ohio rates has resulted in demands upon us for similar reductions from Pittsburgh, Connellsville, Fairmont and Moundsville Districts. Likewise, if the demanded reductions be made to Cleveland, Lorain, etc., we will be faced with demands for extension of the lower level of rates to competing points, such as Toledo (282), Detroit, Erie, Buffalo, etc. Mr. Kern has shown the extent to which the reduction is apt to go.

Cross-examination of Witness Cochran.

By Mr. Burgess:

I understand that coal moving from the Connellsville District mines to Canton and Massillon is largely coking coal. I do not think there is any of the Ohio coal that competes at Canton and Massillon with the Connellsville coking coal.

[fol. 1002] I did not say—although it does—that the Baltimore & Ohio serves Youngstown as a destination. I said that the industries at the places involved in this proceeding compete with industries in Youngstown.

Our road has no (283) Freeport District on its own rails, but it does transport normally a heavy tonnage from that district, such coal originating at the Russellton mine on the Bessemer & Lake Erie Railroad. The rate from that mine to Youngstown is the same as the Pittsburgh rate.

By Mr. Keeler:

(286) In answer to Mr. Burgess' question, I did not mean to convey the impression, and I don't think that I said, that there was not a substantial amount of steam coal used in Canton and Massillon. As I recall Mr. Burgess' question it was, isn't there a large amount of coking coal used at those places and is that coking coal in competition with Ohio coal. I said that I do not understand it is.

[fol. 1003] By Mr. Ballard:

In my statement with respect to competition between the Pennsylvania and West Virginia Districts on the one hand and the Ohio Districts on the other, I was only speaking of

the coal produced on our railroad. There is, of course, competition between the Ohio districts and the other two districts on all roads.

(287) I would not undertake to estimate what proportion of the production in the interstate districts is competitive with Ohio coal. There is a large part of it that is competitive with each other. There is considerable interstate coal used for special purposes that could not truly be said to be competing with Ohio coal. Those special purposes are by-product coking coal and certain metallurgical uses, gas making, etc. They are in competition for heating and steam power purposes. I am not qualified to separate the total production as between those two categories.

My views with respect to the present situation are that the Ohio No. 8 and Cambridge rates to Canton should be the same. They always have been the same. So long as it was left to the railroad to make the rates they were the same. They are the same to Akron and Cleveland and should be the same to Canton from the two fields.

By Mr. Herrold:

(288) They should be the same, in my opinion, to Canton, Massillon, Cleveland and Akron; but not to Youngstown. The Baltimore & Ohio of course is not the rate making route from either field to the Mahoning and Shenango Val- [fol. 1004] leys. We don't even come into the Valley from No. 8 field over our own road with the competitve rate. The only competitive rates we have from the No. 8 field into the Valley—and it is only a part of the Valley—are via Dover and the Pennsylvania.

In speaking about the Connellsville coal and coal generally, it is not my opinion that the rates should vary because of the grade or chemical analysis of the coal.

By Mr. Paisley:

(289) The tonnage figures I gave are the B. & O. tonnages taken from the Davis reports. In saying that the tonnages embraced the tonnages we received from our short line connections, that included such Pittsburgh & West Virginia coal as we haul. I think that would only include coal possibly originating on the West Side Belt part of the Pittsburgh & West Virginia. If it is waybilled by the B. &

O. the copies of the waybills would go to Statistician Davis and would be included in the shipments routed via the B. & O.

By Mr. Tefft:

(290) I heard Mr. Kern's statement to the effect that in his opinion there should be no difference in the rates on coal from the Southern Ohio fields to Toledo and to Cleveland, and I concur in that statement.

Redirect examination of Witness Cochran.

By Mr. Webber:

I have referred to the coal used for metallurgical purposes as not being in competition with some of the coal that [fol. 1005] is used for steam purposes. It is my understanding that a good metallurgical coal must be low in sulphur. Ohio coal is generally pretty high in sulphur and for certain uses would not be adaptable to the same extent that low sulphur coal in certain parts of Western Pennsylvaina and Northern West Virginia are.

There is competition between the various coals for domestic uses. I included that in the term "heating."

[fol. 1006] J. T. CARBINE was called as a witness, and having been duly sworn testified as follows:

Direct examination.

By Mr. Orcutt:

(291) J. T. Carbine, Coal Traffic Manager, Pennsylvania Railroad, Philadelphia. I have been in the coal traffic department of the Pennsylvania Railroad since 1906, having been an officer of the Coal Traffic Department in Philadelphia and Pittsburgh. I have jurisdiction over coal traffic on the Pennsylvania Railroad System.

The Pennsylvania Railroad serves the Middle-Coshocton, Massillon, Ohio No. 8, Cambridge and Crooksville districts in Ohio. I may say that so far as Massillon is concerned there are no active mines in that district on our line. In

Pennsylvania and Northern West Virginia, the principal bituminous coal producing districts we serve are the Pittsburgh, Connellsville in Pennsylvania, the Fairmont in Northern West Virginia on the Monongahela Railroad, the Altoona or Central Pennsylvania Fields, and also the Reynoldsville District.

(292) The principal destinations in northeastern Ohio involved in this proceeding which our railroad serves are Canton, Massillon, Mansfield, Cleveland, Akron and Lorain. All are served directly by the Pennsylvania with its own rails, except Lorain and except Akron in connection with the Akron, Canton, & Youngstown Railway.

The Pennsylvania Railroad carries a large tonnage of [fol. 1007] coal to the destinations I have mentioned from the Ohio, Pittsburgh, Connellsville and Fairmont Districts. To the destinations in Ohio that I have named in 1929 we transported a total of 3,594,139 tons, and in 1931 a total of 1,916,671 tons.

(293) We transport bituminous coal generally throughout C. F. A., including Buffalo and to Canada via the Niagara frontier, the car ferry routes across Lake Erie and via the St. Lawrence gateways, and also into Trunk Line and New England territory, including Tidewater.

Should the reduced rates from the Ohio Districts to northeastern Ohio be permitted to remain in effect and similar reductions be extended to the interstate districts served by the Pennsylvania Railroad based on the tonnage transported in 1929 to the specific destinations involved in this proceeding, the loss of revenue to the Pennsylvania Railroad, assuming that the same reductions extended to the Pittsburgh and other fields would amount to $948,447.62, and based on 1931 tonnage, $516,400.49.

By Mr. Orcutt:

Q. Can you state what the estimated loss in revenue would be should the reduction made in Ohio be extended not only to other origin fields served by the Pennsylvania Railroad, but should also be extended to destinations generally throughout Central Freight Association territory?

A. Yes. These figures will not only include the loss to the Pennsylvania Railroad, but will also include the losses to short line connections, such as the P. C. & Y., Montour,

P. & W. Va. and Monongahela Railways. Based on the tonnage transported during the year 1931 the loss in revenue would be $3,434,745.50 (294) and based on the 1929 tonnage, $4,867,421.77. That does not include coal received from connections other than short lines, such as I have mentioned.

Coal operators in the Pittsburgh, Connellsville and Fair- [fol. 1008] mont Fields are in competition with operators in the Ohio Districts, particular the Ohio No. 8 district. There are industries at Cleveland, Lorain, Canton, Akron and Massillon which are in competition with industries at other important points throughout the territories—particularly the iron and steel plants at those five points, which are in competition with similar industries located at Erie, Buffalo, Toledo, Chicago, Detroit and other points throughout C. F. A. territory—Youngstown particularly.

(295) The shippers and producers on our line in the Pittsburgh, Connellsville and Fairmont Districts, and also to some extent in the Central Pennsylvania field, are in competition with the operators producing coal in Ohio, and it is my opinion that if these reduced rates in Ohio that are under consideration in this proceeding are permitted to remain in effect, there is no question but that coal operators in the Pittsburgh and other districts served by our lines will have great difficulty in competing with Ohio operators, particularly for the steam and domestic coal business in important markets affected, which in turn would, in my opinion, seriously affect our company.

Reductions that have already been made from Ohio have resulted in demands on our company for similar reductions from Pittsburgh, Connellsville and Fairmont Districts. In addition to that, because of the keen competition in the [fol. 1009] steel industry, we believe that if Cleveland, Akron, Canton and Massillon are accorded a lower basis of rates we will be confronted with demands for the extension of these low rates to other destinations throughout C. F. A. territory where there are likewise important iron and steel plants located.

Q. Now is the competition you have referred to confined to Ohio destinations, or does Ohio District No. 8, for instance, compete with Pennsylvania, Connellsville and Fairmont Districts at destinations across the line in Pennsylvania, such as Sharon and Erie, etc.?

A. The competition exists between Ohio on the one hand (295) competing into these points, at least potential competition, exists on Pennsylvania coal moving into Ohio.

Q. What have you to say as to the importance of coal traffic to the Pennsylvania Railroad?

A. As shown by Mr. Kern's Exhibit No. 77, in the first six months of 1932 the bituminous coal traffic on our road represented 44.01 per cent of our total freight traffic. The revenue from bituminous coal traffic represented 29.79 per cent of our total freight revenue.

Q. Based on your long experience, is it your view that the interstate rates from Pittsburgh to the Ohio destinations and the rates formerly in effect from the Ohio Districts to destinations involved are and were on a reasonable level?

A. Yes, sir.

[fol. 1010] Cross-examination.

By Mr. Burgess:

(297) In the past, I think, there have been movements of Ohio No. 8 or Middle District coal into the Shenango Valley points. I know of none at this time. There is no large movement.

I have mentioned the competition between the Inner Crescent coal districts and the Ohio coal districts on domestic and steam coal. Also the destination competition of iron and steel plants located at five cities in Ohio with iron and steel plants located at other points. I mentioned Youngstown. (298) All the others are on the Great Lakes. I don't believe there is any competition between the Ohio coals as used by the steel industry and these Inner Crescent coals except for steam purposes.

By Mr. Herrold:

In some instances it is true that in making coke the coal used consists of both high volatile and low volatile, but in other instances they use exclusively high volatile coal, particularly at this time, when they are not pressing their furnaces, as I understand it.

By Mr. Ballard:

In stating that the Pennsylvania Railroad transports coal throughout Central Freight Association territory, I was

speaking of coal generally. (299) In a general way C. F. A. territory would include north of the Ohio River and east of the Mississippi River, although we do transport coal moving through Chicago to the northwest, and to a limited extent via Mississippi River crossings.

Mr. Ballard: Mr. Webber, I intended to ask Mr. Cochran the same question. Will you agree that his answer would be the same?

Mr. Cochran: His answer as to the C. F. A. would be about the same.

Mr. Ballard: When you said coal transported in Central Freight Association you were talking about all coal and not this coal?

Mr. Cochran: Yes sir.

[fol. 1011] In connection with the revenue losses, I was describing the Central Freight Association territory generally, but I went on to say that we do have coal moving into Chicago and the Northwest through Chicago.

I agree with Mr. Cochran's testimony about the equality between Ohio (300) No. 8 and Cambridge into Canton, Massillon, Akron, and Cleveland.

By Mr. Tefft:

I would not care to express an opinion at this time as to whether there was no justification for any different rate from the Southern Ohio fields into Toledo than into Cleveland.

Redirect examination.

By Mr. Orcutt:

In reply to Mr. Burgess I stated that the competitive points where iron and steel plants were located were all at lake ports, except Youngstown. I had mentioned Youngstown. He knows and I know there are steel plants throughout the Mahoning and Shenango Valleys, but he has not mentioned that. I intended to include Sharon and Sharpsville and other points in the M. & S. Valley District. Those points (301) are across the line in Pennsylvania.

When speaking of the application of these rates into the territory served by the Pennsylvania Railroad, I had solely in mind the origin districts on the Pennsylvania Railroad

and connecting lines in Ohio, Pittsburgh, Connellsville, Fairmont and Altoona Districts, that is, from these origins [fol. 1012] to C. F. A. territory generally as I described it.

(302) Mr. Webber: Mr. Examiner, Mr. Ballard asked this morning if Mr. Cochran would agree to the answer that Mr. Carbine made previously to Mr. Ballard's question, if Mr. Cochran would testify to the same effect, and Mr. Cochran answered that question. I would like now to ask Mr. Cochran if the answer he gave was made in the light of what Mr. Carbine has just said?

Mr. Cochran: The question was not asked as to where our rates applied. It was as to where coal handled by the B. & O. moved or is distributed, and I said it is distributed throughout Central Freight Association, Trunk Line and other places.

Mr. Ballard: Referring to coal generally, and not the coal involved in this case?

Mr. Cochran: Yes, but I had previously explained about coal from fields that ship to northeastern Ohio, and those are the only fields I had in mind when I made that statement. I did not refer to fields that the B. & O. serves in Indiana and Illinois that do not ship into northeastern Ohio.

Mr. Webber: In other words, Mr. Cochran, I understand you had in mind exactly the same territory Mr. Carbine said he had in mind as he has now explained it?

Mr. Cochran: That is true.

[fol. 1013] (303) Mr. Ballard: Might I ask Mr. Cochran a question on the lines he just testified about? You said fields in Indiana and Illinois which the B. & O. served?

Mr. Cochran: Yes sir.

Mr. Ballard: Does the B. & O. transport coal from these fields to destinations in Indiana and Illinois?

Mr. Cochran: It does.

Mr. Ballard: The same is true of the Pennsylvania, isn't it, Mr. Carbine?

Mr. Carbine: In Indiana it is true. We have some coal moves from some southern Illinois coal fields into St. Louis, but I know of none to any extent in Illinois.

Mr. Ballard: But it moves from Indiana fields to Indiana and Illinois?

Mr. Carbine: There is some coal moves, but they are not in the figures I have submitted here. That territory is entirely outside the scope of my figures.

Mr. Ballard: I understand that, but your railroad is engaged in that transportation?

Mr. Carbine: We are engaged in that transportation.

Mr. Orcutt: The definition you gave of Central Freight Association territory was the definition you had in mind in connection with the figures you gave?

Mr. Carbine: Yes sir, from Ohio and districts in Pennsylvania and Northern West Virginia.

[fol. 1014] JOSEPH R. O'MALIA was called as a witness, and having been duly sworn, testified as follows:

Direct examination.

By Mr. Day:

(304) I am Coal Traffic Manager, New York Central Railroad, New York City. I have been about 25 years in the traffic departments of the various New York Central Lines. I have not been in close touch with coal traffic matters during all of that period. For the past six years I have been in direct touch with coal traffic matters. I have jurisdiction over coal traffic matters on the New York Central Railroad. We serve the Ohio No. 8, Middle, Crooksville, Hocking and Pomeroy coal producing districts in Ohio. In Southern West Virginia we serve the Kanawha and New River Districts. In Pennsylvania the Clearfield District, also two small districts known as the Stonesboro and Sutton Districts. (305) The principal destinations in northeastern Ohio involved in this proceeding served by the New York Central either directly by its own rails or in connection with other lines are Cleveland, Lorain, Akron, Canton, Massillon and Alliance, Ohio. We consider it a large volume of coal that the New York Central handles from the Ohio Districts to destinations in northeastern Ohio referred to. In 1929 the New York Central transported 475,347 net tons, and in 1931 737,791 net tons to the destinations previously named. When I say the New York Central transported that tonnage I mean it actually originated that tonnage.

[fol. 1015] We also handle a considerable tonnage of coal to destinations outside of the State of Ohio. I have figures

showing the estimated loss of revenue to the New York Central and its connections, should the reduced rates from Ohio districts to northeastern Ohio be extended to other origin districts on the New York Central Railroad. (306) Based on the 1929 tonnage we figure the loss would be $143,039.24, and based on the 1931 tonnage $202,666.83. As to what the estimated loss would be to the New York Central and its connections should the reductions made in Ohio be extended not only to other origins served by the New York Central, but to destinations generally throughout C. F. A. territory, based on 1929 tonnage, $1,806,117.10; based on 1931 tonnage, $1,271,291.56.

I am familiar in a general way with competition existing between producers of coal in Ohio on the one hand and producers in the Crescents on the other. Producers in the Crescent Districts are in competition with Ohio producers, so far as coal for steam and domestic uses is concerned. As to the extent to which coal from the Crescents is used at those northeastern Ohio destinations for steam or domestic purposes, I haven't any exact figures, but it is my judgment that the preponderance of the movement to the northeastern Ohio points is for steam and domestic purposes.

[fol. 1016] (307) I have prepared five exhibits. The first I offer, No. 79, is a statement of average distance via all tariff routes with rates and earnings per ton mile on bituminous coal from all tariff origins in Ohio origin districts on the New York Central Railroad Company, as indicated in the exhibit.

(Respondent's Exhibit No. 79, Witness O'Malia, received in evidence.)

The exhibit covers Cleveland, Lorain, and Huron as destinations in the northeastern Ohio district.

Exhibit No. 80 is a statement of rates in cents per 2000 pounds showing average distances and earnings per ton per mile on bituminous coal from tariff origins in the Kentucky Districts on the C. & O. Ry. to representative destinations in the State of Ohio. (308) The tariff authorities are shown on page 2.

By Mr. Ballard:

Might I ask the purpose of this exhibit?

Mr. Day: The purpose of the exhibit, Mr. Ballard, primarily is to show the level of interstate rates applying to bituminous coal in the same general territory with which we are dealing here.

Mr. Ballard: But not the destinations in issue?

Mr. Day: Not to the destinations in issue, no.

(Respondent's Exhibit No. 80, Witness O'Malia, received in evidence.)

(310) Exhibit No. 81 is a statement of rates in cents per 2000 pounds, also showing average distances and earnings per ton mile on bituminous coal from tariff origins in the Hocking and Pomeroy Districts on the New York Central Railroad to representative destinations.

(Respondent's Exhibit No. 81, Witness O'Malia, received in evidence.)

[fol. 1917] This exhibit deals with interstate rates in effect out of Ohio to points beyond the western border of the state—points in Indiana. Its purpose is the same as that of No. 80.

Exhibit No. 82 is a statement of rates in cents per 2000 pounds, average distances and earnings per ton per mile on bituminous coal from tariff origins in the Pittsburgh District on the Pennsylvania Railroad and the Pittsburgh & Lake Erie Railroad to representative destinations in Ohio and Pennsylvania.

(Respondent's Exhibit No. 82, Witness O'Malia, received in evidence.)

(311) The destinations on this exhibit, like those in my previous exhibits, are typical consuming points of coal.

Exhibit No. 83 is a statement of rates in cents per 2000 pounds, average distances and earnings per ton per mile on bituminous coal from tariff origins in the Kanawha District of the New York Central Railroad to representative destinations in Ohio.

(Respondent's Exhibit No. 83, Witness O'Malia, received in evidence.)

Our Kanawha District is in the State of West Virginia. This exhibit contains data similar to that contained in my previous exhibit.

[fol. 1018] Based on my experience and knowledge of coal traffic matters, I believe that the rates from the Pittsburgh District to the destinations involved is a reasonable rate.

Cross-Examination.

By Mr. Ballard:

(312) My position with respect to the Number 8 and Cambridge rate adjustment to Canton, Akron and Cleveland would be the same as that of Mr. Carbine and Mr. Cochran.

(313) I have given consideration to the transportation conditions surrounding the comparative rates shown in my Exhibit Nos. 80, 81, 82 and 83 only in a general way. I consider that those transportation conditions might be the same as conditions in Ohio, except on our Alliance Division. I think we have a little more difficult situation there.

Our railroad does not originate and transport coal in Indiana and Illinois, just as the Pennsylvania and the Baltimore & Ohio do. Not the New York Central. The New York Central operates the Big Four under lease.

That the preponderance of Crescent coal consumed in northeastern Ohio is steam and domestic coal is just my judgment from my experience with the movement of coal and the purposes for which it is used up there. I believe that steam (314) and domestic will run over 50 per cent, but I have no statistics upon which to base that. I know of no source from which such information can be obtained, unless the various roads got together and interchanged the information with each other. It is not currently filed that I know of.

[fol. 1019] By Mr. Burgess:

As to whether 50 per cent of the inner and outer crescent coal moving to Canton and Massillon is used for domestic and steam purposes, I could not say. We don't get in there and I don't know much about it. (315) I think I would eliminate Canton-Massillon from the answers I made previously with respect to the consumption of inner and outer crescent coal for steam and domestic purposes in northeastern Ohio.

The distances shown in my Exhibit 79 are included in Mr. Kern's exhibit.

By Mr. Gutheim:

In connection with my Exhibit 80 Columbus is not the only destination in Ohio to which the rate of $1.89 applies from the C. & O. mines in the Kentucky district. As I recall it, there are other points in that vicinity—$1.89. The structure of rates is one that contemplates groups of destinations under the same rates. For the same reason there would be many other destinations to which the rate of $2.14 which I show to Dayton would also apply.

(316) These particular destinations were selected in compiling the exhibit because they are the larger points, points to which considerable bituminous coal moves. The significance of picking the rates to the largest points and showing the average distance via the routes to that particular point is that we could not put all of these group points in this exhibit without making it too voluminous.

The rate of $1.89 from the C. & O.'s Kentucky district applies to Columbus from other districts, I believe. I have [fol. 1020] not checked it out.

I do not know about the volume of the tonnage that is consumed at the various destinations in the destination groups. I couldn't say whether the tonnage to Columbus, for instance, is as large as the rest, or more or less, without considerable digging. (317) The situation is generally the same so far as destinations and the origins shown on my Exhibit 81 are concerned.

By Mr. Brown:

My opinion that the outer crescent and inner crescent coal to Cleveland would be used for steam and domestic purposes more than 50 per cent, as compared with metallurgical, is based on conditions I would say, in 1926, 1927, and 1928.

By Mr. Herrold:

I mentioned two districts in West Virginia from which our line handled coal, the Kanawha and the New River. We have just gotten in the New River district on January 6th of this year, when we opened up this new Nicholas, Fayette and Green Briar Railroad, built from Swiss, West Virginia, in connection with our road to a point near Mallen,

West Virginia, and that is known as the Nicholas, Fayette & Green Briar Railroad, and that puts us into the New River District.

(318) I don't know how many square miles that area covers. It is low, rather medium volatile coal. It is Sewell seam coal.

[fol. 1021] In my figures I have included coal originating on our Kanawha and West Virginia division running north from Charleston, W. Va.

My opinion is that our operating conditions on the Alliance Division are more severe than on the Kanawha and West Virginia division. The Alliance Division extends from Dillonvale up to Alliance. I don't know the distance offhand.

Our Kanawha & West Virginia Railroad is rather hilly; it follows the Kanawha River up from Gauley (319). Operating conditions on the Hitop branch are very severe. My figures include that part of our line. I don't know whether they are more severe than they are on our Alliance Division.

By Mr. Gutheim:

The revenue losses that I gave are not computed by the application of 29 cents a ton all around in the tonnages I mentioned. From our Ohio No. 8 to Cleveland, that is computed on 29 cents, but from the Middle District to Cleveland it is computed on 32 cents. Interstate losses were computed on 29 cents.

(320) The tonnage on which I computed these revenue losses for Ohio was greater in 1931 than in 1929. The contrary was true as to the tonnage on which I computed C. F. A. losses.

By Mr. Tefft:

I don't think there is any justification for a different rate prevailing from Southern Ohio origin groups to Toledo [fol. 1022] than to Cleveland. I think they should be the same as they were before this disruption in the basis. The basis of my opinion is that they have been that way for years and would still be that way if it were not for these

reductions that were made that we are here considering. I believe the previous basis was just and reasonable.

[fol. 1023] T. R. FITZPATRICK was called as a witness and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Day:

(321) T. R. Fitzpatrick, coal freight agent, Pittsburgh & Lake Erie Railroad, Pittsburgh, Pa. I have jurisdiction over the coal traffic of the Pittsburgh & Lake Erie Railroad Company. I have been in charge of the P. & L. E. coal traffic department for 9 years, and I am familiar with the coal operations on our road and rates that apply on that traffic. We serve either directly or through lateral or short lines the Pittsburgh and Connellsville Districts in the State of Pennsylvania and the Fairmont district in northern West Virginia. We publish rates to Cleveland, Akron, Canton, Massillon, etc.

(322) Bituminous coal constitutes the largest item of tonnage handled by the P. & L. E., as shown in Witness Kern's Exhibit No. 77. As an example, during the year 1931, our total coal tonnage was 55.3 per cent of our total freight traffic and tonnage, and during the first six months of 1932 coal was approximately 63 per cent of our total freight traffic.

As to revenue, coal constitutes or has constituted during the past two years more than half of our total income.

The P. & L. E. participates in the haul of a substantial volume of coal from the Pittsburgh, Connellsville and Fair-[fol. 1024] mont Districts to the northeastern Ohio destinations involved in this proceeding. As an example, during the year 1929 the P. & L. E. participated in the haul of 1,720,226 tons of coal to the destinations that would be involved, and in 1931, 1,207,567 tons.

The P. & L. E. also originates and participates in the movement of coal to destinations throughout C. F. A. territory, including lake cargo coal, also coal to the Buffalo-Rochester territory, to Canada and Trunk Line and New England points, including Tidewater.

(323) Should the reduced rates from the Ohio district to northeastern Ohio be permitted to remain in effect and similar reductions be extended to the interstate districts to which the P. & L. E. railroad participates in the movement of coal, based on tonnage transported by the P. & L. E. during the year 1929 to the important points that would be directly involved in this proceeding, the loss to the P. & L. E. and to connecting lines on coal originating on the P. & L. E. and lateral lines would be $443,019.37, and based on 1931 tonnage the loss would be $331,375.05.

Should the reductions made in Ohio be extended from such origins to destinations generally throughout C. F. A. territory, based on tonnage to such territory transported by the P. & L. E. during the year 1929, the loss to the P. & L. E. and connecting lines would be $2,678,294.13, and during the year 1931, $1,938,044.48.

[fol. 1025] I am familiar with the competition existing between coal producers served by the P. & L. E. and producers in Ohio. Our operators are in competition with producers of coal in the Ohio field.

(324) We have some individual statistics in our office that I have gone over, and more than half of the coal that we handle to the principal points of destination involved in this proceeding is coal for steam and similar heating purposes that would be in competition with Ohio coal.

There are industries located at Cleveland, Lorain, Akron, Canton and Massillon which are in competition with industries at other important points throughout the territory.

There are important iron and steel plants at Youngstown, Erie, Buffalo, etc., that are in competition with similar industries at Cleveland, Lorain, Akron, Canton and Massillon. By Youngstown I include the Mahoning and Shenango Valley points in Pennsylvania.

My judgment is that if the reduced rates in Ohio involved in this case are permitted to remain in effect the coal operators in the Pittsburgh and other districts served by the P. & L. E. and lateral lines will not be able to successfully compete with the operators in Ohio, particularly for the steam and domestic coal business in the important destinations that are involved, and the loss of such tonnage would affect our railroad materially.

(325) We have had a number of demands from shippers on our lines for the same measure of reductions in our rates

[fol. 1026] as were made intrastate in Ohio to these northeastern Ohio destinations. I am thinking about locking the office door and taking out the telephone.

Cross-examination.

By Mr. Burgess:

Among the locations where I stated there were steel plants I mentioned Erie, I guess it is a blast furnace up there. It gets its coal from mines in the Connellsville District. They have a coke oven there. I am speaking of the Perry Iron Company.

(326) There are some very important steel plants on our line at Aliquippa, Woodland, Monessen, Clairton and Duquesne. They receive their coal by river.

In figuring our assumed relative reductions, I figured a reduction of 29 cents in the interstate rates from the Pittsburgh, Connellsville and Fairmont Districts to Youngstown, Ohio.

By Mr. Gutheim:

The steel plants that I just mentioned, that receive their coal by river, get it from the river mines in the state of Pennsylvania.

There are a great many other mines in the Pittsburgh district that are not on the river.

[fol. 1027] By Mr. Ballard:

I do not have a copy of the statistics I referred to on my direct with respect to steam and domestic coal versus special purpose coal. It is just a study made from our own statistics. We keep those currently. We have a statistician in the office (327) who has a lot of forms that keep them by consignees largely, and that is how I judge it, by the consignees. That is the best way I know of for telling what kind of coal we are carrying, by the name of the consignee or his business.

There are many large receivers of coal that use both special purpose coal and steam coal. The majority of their coal is special purpose coal and I did not consider them. In other words, if some blast furnace got coal via our rail-

road I would consider that 100 per cent of his coal was special purpose coal.

Take the Otis Steel Company at Cleveland for instance. They have a by-product coke plant and they also receive steam coal. In making my analysis I disregarded that company, even though I knew a part of the coal they received was steam coal.

(328) In the proportion that I gave I included for the most part the actual destinations involved in this case, but in addition I included intermediate destinations of importance to which, via our route, we would also have to reduce our rates.

[fol. 1028] I did not figure the exact percentage when I said that more than half was steam and domestic. I would say around 60 or 62 per cent. I would rather not produce those figures for this record. As a matter of fact, I don't know how I can under the law. We would be disclosing business of one shipper to another. Not only that, but our competitors would be soliciting the business. (330) My figures are based on actual statistics we have, and I am under oath, I am not assuming at all.

(Mr. Ballard requested (328) that the witness be made to produce for the record the figures on which he based his estimate of 62 per cent, without the disclosure of the names of the consignees, but with sufficient details to enable Mr. Ballard to check the figures. (330) Defendants expressed a willingness to supply the two aggregate figures of total coal tonnage and the portion thereof consisting of steam or domestic coal, which offer Mr. Ballard rejected. Examiner Trezise (331) overruled the request.)

By Mr. Burgess:

(331) In my estimate of 62 per cent coal from the Inner Crescent Districts served by the P. & L. E. used for steam and domestic purposes in Northeastern Ohio, I included Canton and Massillon. The 62 per cent did not apply to Canton and Massillon as destination points. At Canton and [fol. 1029] Massillon the coal used for steam and domestic purposes as compared with metallurgical purposes or special purposes was very small in comparison with the other destinations.

By Mr. Martin:

(332) I was correctly understood to say that if the reductions were applied both interstate and intrastate the loss to the P. & L. E. and connecting lines for 1929 tonnage would be about two million six hundred seventy-eight thousand dollars, and for 1931 about one million nine hundred and thirty-eight thousand. Those connecting lines include destination lines which make deliveries to points beyond our railroad. They would include the New York Central and Erie Railroads on coal that we originate. We do not publish any coal rates in connection with the B. & O. and the Pennsylvania. They would not include the lines which Mr. O'Malia testified to earlier as sustaining a loss from the same theoretical reduction. He figured possibly our individual originating tonnage. There would be no duplication within his figures and my figures.

By Mr. Herrold:

(333) We do not publish coal rates to the Pennsylvania nor the B. & O., except the old G. R. & I. up in Michigan, which is now a part of the Pennsylvania, and the former Baltimore & Ohio Southwestern. We don't publish to those particular destinations. There are points in Ohio to which we publish joint rates, destinations on the B. & O. and Pennsylvania Railroad.

[fol. 1030] The figure that Mr. Martin mentioned, the last one, about $1,938,000, covers the entire C. F. A. territory. The former figure covered shipments only to the territory here involved. The lateral lines that I mentioned, that the figures include, are the Monongahela Railway, the Montour Railroad, the Pittsburgh, Chartiers & Youghiogheny Railway, and the Pittsburgh & West Virginia Railway in Pennsylvania.

Redirect examination.

By Mr. Day:

There is no duplication in my figures and the figures offered by any of the other railroad witnesses. (334) Collectively they are shown by Mr. Kern in his exhibit.

It is suggested that Mr. Burgess' question and my answer, as to the inclusion of Youngstown in my tonnage and

revenue prediction indicated that we had included Youngstown as a point of destination in the Northeastern territory of Ohio affected by this proceeding. I did not intend to leave that implication. Youngstown is treated as a part of the C. F. A. adjustments generally.

[fol. 1031] G. F. Butler was called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Younger:

(334) G. F. Butler, General Traffic Manager, Norfolk & Western Railway, Roanoke, Virginia. My headquarters are at Roanoke. I have been in the Traffic Department of the N. & W. about 40 years. (335) I have been in charge of coal traffic matters since the first of February, 1927.

The interests of the Norfolk & Western Railway in this case are in the maintenance of the rate relationships which existed prior to the recent reductions in the Ohio intrastate rates, or at least to see that those differences are not increased to the disadvantage of the Norfolk & Western Railway and producers of coal on its line. We have on our lines some 151 mines producing bituminous coal suitable for all uses to which coal is put. These mines are grouped for rate purposes in two major groups, i. e., the Kenova-Thacker group, which is part of what is commonly known as the Inner Crescent; then there is the Pocahontas-Tug River group, which is part of what is known as the Outer Crescent group.

Mines on the Norfolk & Western Railway in these two groups produce and ship annually a large volume of coal, aggregating some thirty million tons. That coal is marketed largely in the important consuming territory in Ohio, Michi-
[fol. 1032] gan, Indiana, and Illinois. In going to all of these markets and almost all other markets to which our coals are shipped that coal must be hauled for longer distances than competitive coals from some other producing districts. As a result, to all of the important markets, and particularly to those important markets in the States of Ohio, Michigan (336), Indiana and Illinois, including destinations

directly involved in these cases, our coals move under substantial disadvantages in freight rates in comparison with rates from other competitive districts. To all of what is commonly designated as the affected territory as described in I. & S. 774, rates from the Kenova Thacker group are made a uniform differential of 50 cents per ton higher than the rates from the Ohio groups and the differential from Pocahontas-Tug River groups is uniformly 75 cents over the Ohio group. To non-affected territory our rates are also made differentials, varying in amounts, to the different destinations over rates from other producing districts. To the territory in Northeastern Ohio which is here involved, including Cleveland, Akron, Lorain and Huron, our rates for many years have been related to the rates from the Southern Ohio groups—the Hocking District being the base.

Prior to July 1st, 1917, rates from the Kenova-Thacker group to Cleveland and the other points mentioned were [fol. 1033] made uniformly 25 cents per ton higher than the rates from the Hocking district to those destinations. That was the differential which existed between the respective origin groups to affected territory prior to the decision in I. & S. 774. Our rates to Cleveland have for many years been exactly the same as the rates to Toledo, Ohio, which is in the affected territory, and the differences between the rates from our groups and the rates from Ohio groups have been the same to both Cleveland and Toledo. When the Commission in I. & S. 774 authorized (337) increases in the rates from the Inner Crescent groups, including the Kenova-Thacker group, to affected territory, including Toledo, and a consequent increase in the differential between the Inner Crescent group and the Ohio groups to affected territory, we found it necessary to make similar changes in our rates to Cleveland in order to continue the parity of Cleveland and Toledo. In fact, it was necessary to make these changes to Cleveland because some of our important routes to Cleveland extend in part through the Toledo group and, if we had made no changes in the rates to Cleveland at the time the Toledo rates were increased under I. & S. 774, Fourth Section departures would have resulted.

These changes increased the difference between our Kenova-Thacker group and the Hocking district to Cleveland [fol. 1034] from 25 to 40 cents per ton, the same as the differential between those origin groups to all of affected terri-

tory. The difference was further increased to 56 cents as result of changes made under Ex Parte 74, when the Ohio Commission refused to permit increases in the Ohio intrastate rates from the Hocking districts to Cleveland in excess of a straight 40% increase; then the difference became 50 cents on July 1, 1922 under the general 10% reduction and that difference is the same as the differential prescribed by the Commission for the Inner Crescent groups over the Ohio groups to destinations in affected territory in the Ohio-Michigan cases. The reductions which have recently been made in the Ohio (338) intrastate rates would change these differences from 50 to 79 cents and further materially increase the disadvantages under which the Norfolk & Western Railway and coal producers on its line labor in reaching the Northeastern Ohio markets. Whereas the difference prior to 1917 was 25 cents, these new reductions would create a difference of 79 cents. Whereas the Commission prescribed a differential of 50 cents to Toledo and other points in affected territory, the difference to Cleveland and Northeastern Ohio has become 79 cents.

These markets in Northeastern Ohio have until recently been important to producers on the Norfolk & Western Rail- [fol. 1035] way, who have annually shipped large tonnages of coal to those markets. In the year 1929 they shipped to Cleveland, Akron and Lorain a total of one and three-quarter million tons. That tonnage has been substantially curtailed since 1929. These additional rate disadvantages which have resulted from the recent reductions will make it increasingly difficult, if not impossible, for Norfolk & Western Railway producers to reach those markets in competition with Ohio coals for steam and domestic purposes.

If the reduced Ohio intrastate rates are permitted to continue in effect there would be two possible courses for the Norfolk & Western Railway to pursue: 1st—We might take no action whatever toward meeting the reductions and suffer the increased (339) disadvantages in rates from our producing fields, in which event it seems entirely likely that our producers will be unable to market their coal in these Northeastern Ohio markets for uses for which the Ohio coals are suitable. They would be entirely barred from these competitive markets by the severe rate handicaps and we would lose the traffic we have heretofore enjoyed. 2nd—We might endeavor to meet the situation by making the same reductions

in our interstate rates as have been made in the Ohio intrastate rates, so as to preserve the relationship which existed prior to the recent reductions. But if we should do that the [fol. 1036] consequences may be very far reaching. To illustrate this, I have already mentioned the fact that some of our important routes to Cleveland—indeed the short route from our origins to Cleveland—extends in part through the Toledo group. Our rates are today the same to Cleveland as to the Toledo group. If we should reduce the Cleveland rate 29 cents in order to meet the reductions in the Ohio intrastate rates, and to preserve the former relationship, Fourth Section departures would be created, which might force a similar reduction of the Toledo group rate.

Moreover, aside from the requirements of the Fourth Section, there seems to be no justification for a lower rate from our fields to Cleveland than to Toledo, for the routes are in large part the same and the distances are not greatly different. If the Toledo group rate becomes involved then the reductions (340) might well spread over the entire affected territory because the Toledo rate is the key for making the rates to a large portion of the affected territory. So that if these reductions in the Ohio intrastate rates to points in Northeastern Ohio are continued the Norfolk & Western Railway must suffer these greatly increased disadvantages or meet those reductions with consequent wide spread reductions elsewhere and tremendous revenue losses on the great volume of coal that moves into that territory. [fol. 1037] If we should meet the reduction which has been made in the Ohio intrastate rates by a similar reduction from our mines, assuming that we had the same tonnage we had in 1929, the revenue loss to the Norfolk & Western and its connections on that coal would be over half a million dollars. If that reduction should spread to the other territory, the affected territory, our revenue losses would be many times greater. To that affected territory we ship a number of millions of tons of coal every year.

(341) I have said that we seek to continue the differences that existed prior to the recent reductions in the Ohio intrastate rates when the difference between Kenova-Thacker and Hocking was 50 cents. As I have heretofore stated, that difference is exactly the same as exists between these same origin districts in the rates to Toledo, points in the Toledo group and points in the affected territory generally, as re-

sult of the decision of the Commission in the Ohio-Michigan coal cases. I know of no reason why any greater difference should exist between the same origin groups in the rates to Cleveland and other northeastern Ohio points. Moreover, that difference is certainly great enough in comparison with the differences that exist between the several Ohio districts themselves.

[fol. 1038] To substantiate this statement I now offer my Exhibit No. 84 which was primarily prepared to set up the difference in the distances and rates to Cleveland, Ohio, a representative point, from the N. & W. Kenova and Thacker Districts and from Ohio districts shown thereon.

(Respondents' Exhibit No. 84, Witness Butler, received in evidence.)

This exhibit sets up two sets of differences in distances and rates, the first as between the Hocking District (342), used as the base district, and the N. & W. Kenova and Thacker Districts; the other set of differences in distances and rates is between the Ohio districts: No. 8, Hocking, Pomeroy and Jackson, with the No. 8 used as the base district.

This exhibit shows that the rates from the Kenova and Thacker Districts over the normal rate from the Hocking District are 50 cents, and over the reduced rate from the Hocking District, 79 cents, which are 35 and 64 cents, respectively, greater than the differential of 15 cents in the inter- and intrastate rates from the Hocking, Pomeroy and Jackson Districts over the No. 8 District, whereas the excess distances for these differentials are approximately the same.

The intrastate rate of $1.60 shown from Jackson District is not published today, but it is proper to assume that that will be the rate from the Jackson District to Cleveland, Ohio, in the event the present $1.60 rate from the Hocking [fol. 1039] and Pomeroy Districts become permanent, because these three districts have always been on a rate parity, that parity having been recognized by the Commission in the Ohio-Michigan coal cases.

I have stated that the rates from the Kenova Thacker field have been related in the past to the rates from the Hocking District. It is my understanding that the Hocking district rates are in turn related to the Number 8 rates,

so that our rates from the Kenova-Thacker District are even (343) greater than 50 cents in excess of the rates from the Ohio Number 8 District.

I have also referred principally in my testimony to the Kenova-Thacker District rates. To all his northeastern territory the Pocahontas and Tug River Districts on our lines are differentially related to the Kenova-Thacker District. Pocahontas and Tug River is 25 cents over Kenova-Thacker, and instead of being 50 cents over Hocking they are 75 cents over Hocking.

[fol. 1040] Cross-examination.

By Mr. Martin:

(343) I cannot answer offhand, as to whether 1929 was our peak year for the movement of tonnage from our districts to Cleveland, Lorain, and Akron. It is shown in one of Mr. Kern's exhibits, from 1922 up, from the several Outer Crescents and the Inner Crescent Districts. I separated as to the Norfolk & Western. Both 1930 and 1931 have been very much lower than the 1929 figure I gave.

By Mr. Herrold:

(334) The tonnage figure I gave of one and three quarter million tons that moved to Cleveland, Akron and Lorain during 1929, was all coal from Norfolk & Western mines. It may have included coal from points on the Virginian Railway. We publish rates from points on that railway.

Our short route to Cleveland is the Big Four via Columbus through affected territory. (345) I could not say as to whether the majority of our tonnage to Cleveland moves over that route. We have several routes to Cleveland, we have one via the Pennsylvania, we have another via the C. & O. and Fostoria. The route via the Pennsylvania Railroad, by interchanging our traffic at Columbus, would not extend through affected territory—not via the Pennsylvania direct.

By Mr. Ballard:

Q. Mr. Butler, if you should elect to hold your interstate rates where they are today, how much steam and

domestic business do you estimate your operators would lose in Northeastern Ohio?

[fol. 1041] A. I don't know, Mr. Ballard, what the proportion of the steam and domestic coal is to the total movement, therefore, I cannot answer that question except by saying that if we held our interstate rates where they are we would lose all the steam and domestic business we have. I don't believe our operators could stand the additional 29 cents.

I don't know what the proportion is, but I do know that our people have had for some years a very important steam and domestic market in Cleveland. They have such a market in affected territory, and also in non-affected territory west of affected territory. I would say that our coal goes all over the central west and northwest (346) for steam and domestic purposes.

In shipping into the northwest for steam and domestic purposes, I do not recall any rate differential against them that our operators have to overcome that are larger than these increased differentials—that is in comparison with Ohio. Our differential into affected territory is 50 cents and to Chicago territory I think it is 35 cents over Ohio. It may be true that as against some other coal, our operators have to overcome much higher differentials into Chicago territory than the differentials over Ohio. As to whether it is up as high as $1.44 and even $1.74, I don't know. I haven't the figures. I have no knowledge of the rates from Indiana and Illinois. If you say those are the differences I accept your statement.

[fol. 1042] (347) If we should elect to reduce our interstate rates in case these state rates remain undisturbed, it would not be for the reason that our rates are unreasonable. We regard them as reasonable so long as our relationship with the competitive districts is left unchanged. We would not expect to change our rates. I don't know that I have investigated the intrinsic reasonableness of them. I would not like to answer that question right now. I would say I have no intention of changing them except for this disturbance of the relationship.

By Mr. Gutheim:

When I say that "our people have considerable steam and domestic market in Northeastern Ohio," I refer to

operators on the Norfolk & Western—not only the Kenova and Thacker operators, but also the Pocahontas and Tug River operators.

(348) The Pocahontas and Tug River production is larger than the Kenova-Thacker production. The former movement into northeastern Ohio for steam and domestic use is larger than the latter.

Pocahontas coal is not the same as Ohio coal. It is a smokeless coal, and we think it is better than Ohio coal. As against the Ohio coal for domestic use, it would be my impression that our Pocahontas coal is a premium coal, although I have no knowledge of the prices. There is a limit beyond which premium coal can command a market.

There are other districts, not on the Norfolk & Western, that also take the $2.39 rate to Cleveland that Kenova and Thacker take—the high volatile districts on the C. & O. and [fol. 1043] the L. & N., running down into southeastern Kentucky and northeastern Tennessee.

(349) With respect to the differential relationship of the Southern Appalachian Districts to Hocking in the Cleveland market, I don't think that differential has ever been Commission-prescribed. It has been prescribed to Toledo because our rates have always been on a parity. We have kept Cleveland on a parity with Toledo, as Toledo has been changed. We were required to publish the same rate to Canton as to Cleveland, I think. That is the only case I recall.

By Mr. Lorenz:

Referring to my Exhibit 84, the only reason I do not show the rate per ton per mile is because this exhibit was intended to show the difference between the distance in a comparison of the total rates.

[fol. 1044] A. P. Gilbert was called as a witness and, having been duly sworn, testified as follows:

Direct examination.

Mr. M. Carter Hall:

(350) A. P. Gilbert, Richmond, Va. I am freight traffic manager of the Chesapeake & Ohio Railway. In 1903,

when appointed Assistant General Freight Agent in charge of freight rates and tariffs, I came in direct personal touch with the coal rate structure from the coal producing areas served by the Chesapeake & Ohio Railway Company as it then existed and the controlling competitive reasons therefor. Since that time, as General Freight Agent, and since October, 1925, as Freight Traffic Manager, excepting a period of nearly two years, 1918-1920, when serving as a member of the Eastern Trunk Line Committee of the United States Railroad Administration, I have been in personal touch and general charge of the freight rates of the Chesapeake & Ohio Railway Company. On May 1, 1930, the Chesapeake & Ohio Railway Company acquired the Hocking Valley Railroad, now the Hocking Division of the Chesapeake & Ohio Railway Company, and my jurisdiction as Freight Traffic Manager was extended over that property.

(351) In Ohio, the producing coal districts which we serve are principally the Hocking and Pomeroy Districts of southern Ohio and a relatively small tonnage from the Jackson District. These districts produced in 1929, the last year before the depression, 1,321,522 tons of commer- [fol. 1045] cial coal and 958,560 tons for 1931.

The commercial coal from these Ohio districts is marketed chiefly within the state of Ohio, including Cleveland, and to destinations in the southern Peninsula of Michigan, including northern Indiana, to which the rates bear a fixed relation to the rates from the Inner Crescent groups as described in the testimony of Witness Kern, as a result of the decision of the Interstate Commerce Commission in the Ohio-Michigan Coal Cases, 80 I. C. C. 663.

The interstate coal districts that the Chesapeake & Ohio serves are the Kanawha district of southern West Virginia and the Kentucky and Big Sandy districts of eastern Kentucky, all included within the so-called Inner Crescent group, and the New River District of West Virginia, included in the Outer Crescent group. The total production of these mines for the year 1929 amounted to 54,079,799 tons and for 1931 42,967,949 tons. Approximately 75 per cent of this tonnage moved westbound to markets in the state of Ohio, southern Peninsula of Michigan, Indiana, Illinois and the northwest (352), the latter both all-rail and by lake cargo shipment through the ports of Toledo

and Sandusky, Ohio. A large preponderance of this tonnage was to destinations in the states named lying west of the Sandusky-Galion line in the so-called "affected" terri- [fol. 1046] tory the rates to which are definitely related to the rates from the southern Ohio groups and with other origin groups within the so-called Inner Crescent, as a result of the Interstate Commerce Commission's decision in the Ohio-Michigan Coal Cases, supra, as described by Witness Kern in his testimony concerning the rate adjustments.

The line of the Chesapeake & Ohio Railway proper was completed to Huntington, West Virginia in the early 70's, giving a westbound rail outlet to the coal from both the Kanawha and New River producing fields. The mines of the Kanawha and New River districts as originally developed were located, in the main, along the main line of the railroad, the lateral branch lines now included within these fields being of a later and gradual development. It was not, however, until the completion of the Maysville & Big Sandy Railroad, in 1889, now the Cincinnati Division of The Chesapeake & Ohio Railway Company, forming a rail connection from the then western termini at Huntington, W. Va., to Cincinnati, with interchange to the rail lines radiating from that gateway, that (353) the coals produced on the Chesapeake & Ohio Railway became a factor in the markets of Ohio, Indiana and Michigan and the Middle Western States generally. At that time the coals [fol. 1047] produced in the older producing fields of Ohio and the Pittsburgh district of Pennsylvania were well entrenched in the markets of these states under a rate adjustment by which the Pittsburgh rates were held at a fixed differential per ton over the rates from the Ohio producing districts to destinations that may be roughly described as lying west of a line drawn from Sandusky, Ohio south through Galion, Ohio. That was the rate and commercial competition that confronted the newly developing coal fields of The Chesapeake & Ohio Railway Company necessitating the adoption of the Pittsburgh rates to the destination territory I have described, in practical, if not utter, disregard of relative distances. Later the Eastern Kentucky fields, known as the Kentucky and Big Sandy districts, were developed, and for the same competitive reasons were given the Pittsburgh rates.

Witness Kern in his rate testimony has shown how the original differential from the Pittsburgh group to the so-called "affected" territory, lying on and west of the Sandusky-Galion line, has been successively increased over the Ohio base districts from 25 cents per ton to the present basis of 50 cents per ton. The rates so made to Toledo, Ohio, at present $2.39 per ton, 50 cents in excess of the [fol. 1048] concurrent rate from the southern Ohio base groups from the Kanawha and related districts were gradually extended (354) as a maximum and minimum to a large number of stations in northeastern Ohio, roughly bounded by a line extending east from the Sandusky-Galion line via the south shore of Lake Erie, to and including Painesville, thence through Warren, Ohio, Sharon, Pa., down the Ohio River to Bellaire, Ohio. This adjustment obviously did not produce an equality of rates from the Kanawha and related groups with the Pittsburgh rates to the zone I have just described, as is true of destinations west of the Sandusky-Galion line, but it did place the rate at a level admitting the marketing of a considerable tonnage of the higher grade specialty coals within these areas in competition with the production of similar coals in the Pittsburgh, Connellsville and Meyersdale regions.

As stated by the Commission in 46 I. C. C. 122, with reference to the growth of the coal fields and the spread and measure of the differential, Pittsburgh over Ohio—

"It was adopted by the lines serving the later developed districts of the Crescent to meet commercial conditions and to put those coals in competition with Ohio coals and coals from the northern part of the Crescent."

[fol. 1049] These competitive conditions exist today. There is both carrier competition and commercial competition throughout the territory involved. Mention has been made by the Commission in various decisions relative to this competition. In 46 I. C. C., page 120, the Commission states (355) "These West Virginia coals sell in competition with each other, with other Crescent coals and with Ohio coals in affected territory." There are other references in this decision where the competition between the coals produced in the various districts is mentioned. This competition existed when the Commission rendered its decision in I. & S. Docket 774, which was decided July 13,

1917. It exists today. The rate structure in the territory involved has been practically stabilized for many years, as stated by the Commission in 80 I. C. C. 663, at page 685—"Stability is of peculiar importance to a highly competitive commodity like coal."

In my opinion, the reductions ordered by the Ohio Commission if continued in effect, must cause a shift in tonnage and a consequent disruption of the stability of the freight rate structure on coal. There is a large consumption of C&O coal in the northeastern part of Ohio in the territory covered by the Ohio Commission's orders. The [fol. 1050] commercial competition is keen, and each carrier serving the coal fields must, in the interest of its operators in finding markets as well as its own interests, endeavor to obtain a part of the tonnage destined to these consuming points. The result of the Ohio Commission's order is to considerably widen the difference in the rates as between Ohio and the Crescent districts that has existed for many years. We are convinced that the ultimate effect will be to spread the difference in rates created by the decisions of The Public Utilities (356) Commission of Ohio from the Ohio districts, if continued in effect, to the Inner Crescent groups of our lines, the Kanawha group lying, generally speaking, on the opposite side of the Ohio River from the Pomeroy, Ohio, fields, a base group, and probably not exceeding 55 miles in distance as the crow flies.

Under the stress of competition I have described, with a consequent general lowering of the freight rate structure in C.F.A. territory, which is now of a low level, the Interstate Commerce Commission having stated in 100 ICC 353, Carnegie Steel Co., "That rates maintained"—they were speaking of the rates to Central territory—"That rates maintained, under this highly competitive adjustment could hardly be considered as standards of reasonableness for [fol. 1051] rates maintained under other conditions," there will result a disastrous reduction in the carriers' revenues without any increase in the aggregate tonnage of coal moved. A rough estimate of the loss in revenue of the Chesapeake & Ohio Railway Company as a result of a reduction of approximately 29 cents per ton on the tonnage that would be affected is $8,530,582. This estimate is based on the tonnage, less lake cargo tonnage, that moved in 1929, which is the last year previous to the depression.

A similar estimate of the prospective loss as applied to the tonnage of 1931 is $5,754,817. Whatever reductions are forced in the rates from the Kanawha district will, in my judgment, in all probability extend to the other Crescent districts.

Cross-examination.

By Mr. Burgess:

(357) I think the order of the Ohio Commission in Docket 7252 reducing rates from the Ohio No. 8, Middle and Massilon districts to Canton and Massillon will shift tonnage from the Inner and Outer Crescent districts to these Ohio districts. I have in mind particularly a point like Cleveland. I don't think it would particularly at Canton and Massillon, because it is a specialty coal movement there [fol. 1052] mostly. I do not admit, however, that the order of the Commission, so far as Canton and Massillon are concerned, would not have much effect upon the Inner Crescent and Outer Crescent coal. I think 29 cents is quite a considerable amount to be added to the present disadvantages they have in rates from the other fields that produce similar coal, and that is what it would mean. (358) It is specialty coal that moves into Canton and Massillon under the relationship of rates before the Ohio rates were reduced, but there is specialty coal produced in other fields, as Meyersdale, and there is a specialty coal produced in the Pittsburgh fields that I understand may be mixed with the Ohio coal for their purposes.

I think all Crescent groups would be affected by the continuance of the Ohio Commission's orders in these cases, to Canton and Massillon. From the Kanawha Logan field to the Canton group 31,752 tons moved into Canton and Massillon from the Inner and Outer Crescent districts, in 1931. From the New River field there was 650 tons. I cannot say whether the former figure was a special purpose coal. (359) I am inclined to think it was. But it competes with similar coal that might originate in the Pittsburgh and Meyersdale regions.

[fol. 1053] Canton and Massillon are not in differential rated territory where the Kanawha district would line up with Pittsburgh. Therefore, as we could not maintain in that territory without violating the Fourth Section any

lower rates than we might have concurrently in Cleveland, the Cleveland rate would continue to be our maximum and minimum rate. It would spread the difference between the Pittsburgh and Meyersdale field. The difficulty we anticipate is that the Pittsburgh rate might be reduced into Canton and Massillon and the Meyersdale rate, more than the rate from Thacker.

To the Canton group there moved from the Tug River districts 20,270 tons, and from Pocahontas 5,591. For 1931, Kenova-Thacker, 3,576 tons.

(360) Going back to 1929, I am asked whether or not the same statement shows that approximately 230,000 tons moved during that year to the Canton group from all of the fields which I mentioned. I have not added it up. If you have I accept your figures. I think the majority of that was specialty coal.

By Mr. Ballard:

I think that under this increased differential our operators will lose all their steam and domestic business in northeastern Ohio. Taking northeastern Ohio altogether, [fol. 1054] in 1929 we moved from both crescents to the Ohio field, into Akron, Alkali, Painesville, Alliance, Canton, Cleveland, Lorain and Massillon groups a total tonnage of 1,358,923 tons. In 1931 from the same groups and to the same groups we moved a total of 834,908 tons. (361) I could not say as to how much of that was steam and domestic. If we lost some of that, I don't think that we would lose an appreciable amount to ourselves.

Q. The 79 cent differential would not divert coal from your southern districts to the Ohio districts?

A. The productivity of our Southern Ohio Districts is nothing like comparable with that in the Crescent group. It is supposed to be fine domestic coal. It would not take up the volume we would lose from the Crescent groups.

By Mr. Gretheim:

Our New River coal is similar to Pocahontas. We claim it is a little better than Pocahontas. It is a very good coal, I admit.

(362) As to our high volatile coals, we have in Kanawha and our Big Sandy districts in eastern Kentucky a pro-

duction of what is called splint or hard structure coal. That enters into the domestic market very much in the northwest. I would not call that a premium coal.

I would not attempt to answer the question as to whether our Elkhorn coal sells in general as a premium coal. I know it is a very good coal. It is a hard structure coal and used as such, domestic.

[fol. 1055] Testimony Taken at Columbus, Ohio, December 15, 1932.

J. Elmer Monroe was called as a witness and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Webber:

(363) I am statistician, Bureau of Railway Economics, Washington, D. C. I am in direct charge of the assembling and compiling of various statistical information. I have come here in response to a subpœna issued from the Commission at the request of the respondents in this proceeding.

I have prepared a number of exhibits relating to the financial situation of the carriers in the Eastern District, as well as various statistics that relate to that subject.

My first exhibit, No. 85, consists of 13 separate sheets.

(Respondents' Exhibit No. 85, Witness Monroe, received in evidence:)

(364) Sheet 1 of the exhibit is headed, "Property Value and Operating Income Account of Class I Railways in the Eastern district (including Pocahontas Region)."

(366) Sheet 1 shows, for the Eastern district, including the Pocahontas carriers, years 1921 to 1931, and for the [fol. 1056] first nine months of 1932, the property investment of steam railway carriers of Class I, the Ex Parte 74 findings of value of the Commission plus subsequent net additions and betterments, the principal items in the revenue and expense accounts, and the net railway operating income. (367) The final two items, lines 30 and 31, show

the respective rate of return on property investment and on the Ex Parte 74 findings as defined.

Total operating revenues, line 9, totaled $2,656,234,070 in 1921, and reached its peak for the period of $3,191,571,038 in 1926. Revenues declined in 1927 and 1928, rose in 1929, declined almost half a billion dollars in 1930, and declined over half a billion dollars in 1931. They have still further declined during the current year.

Total operating expenses were sharply reduced between 1929 and 1930, were again reduced in 1931, and further reduced in 1932.

Net railway operating income increased almost steadily from 1921 to 1926, showed a decline in 1927, then increases in 1928 and 1929, then a sharp drop in 1930, and still further declines in 1931 and 1932 (9 months).

The rate of return on property investment, line 30, which stood at 2.83 per cent in 1921, increased to 1923, and again [fol. 1057] increased in 1925 and 1926. The rate for 1926 was 5.52 per cent, which is the peak rate of return since the war. There was a drop in 1927, then increases in 1928 and 1929, the rate for 1929 being 5.39 per cent. It then declined to 3.63 per cent in 1930, and dropped to 2.24 per cent in 1931, and for the first nine months of 1932 dropped to a new low level of 1.57 per cent.

The rate of return on Ex Parte 74 findings of value as defined, line 31, follows the same general trend as the rate on property investment. The rate of return on (368) Ex Parte 74 findings stood at 3.07 per cent in 1921; 5.90 per cent in the peak year of 1926; 5.69 per cent in 1929; and declined steadily to 1.64 per cent for the nine months of 1932. The rates of return shown for 1932 (9 months) are computed on the value base as of the beginning of 1932, and are computed on an annual basis.

Sheet 2 of Exhibit No. 85 corresponds to Sheet 1 and shows the same items, but relates to the railways of Class I in the Eastern District, excluding the Pocahontas Region.

The Pocahontas lines are the C. & O., the Virginian, the Norfolk & Western and the R. F. & P.

I have shown on my Sheet 1 the rate of return on the book investment of the carriers and also on the Ex Parte [fol. 1058] 74 findings of the Commission. I have termed in the heading of this exhibit those two basic items, "property value." Sheet 3 shows, for each year from 1921 to 1931,

and for the first nine months of 1932, what proportion of the total operating revenues were absorbed by operating expenses, by taxes, and by other deductions that are made before net railway operating income. The upper section of the statement shows the statistics (369) for the Eastern District, including the Pocahontas Region, followed by corresponding information for the Eastern District, excluding the Pocahontas Region.

For the railways of the Eastern District, including the Pocahontas Region, the proportion of the revenue dollar remaining after expenses, taxes, etc., have been met, was 10.3 cents in 1921. This is the net railway operating income, available for fixed charges, other deductions, reserves, dividends, etc. The proportion increased to 19.0 cents per dollar of revenue in 1926, and reached its high point of the period at 20.3 cents per dollar in 1929. The proportion then declined to 16.8 cents per dollar in 1930, to 13.0 cents per dollar in 1931, and to 12.0 cents per dollar for the first nine months of 1932.

Sheet 4 compares the financial returns of Class I car-
[fol. 1059] riers in the Eastern District, for the first nine months of 1931 and 1932.

The declines in all items of rail revenue that began in 1930 and continued in 1931, have so far continued in 1932. At the same time, the carriers have made further cuts in operating expenses in 1932, but have found it impossible to match each dollar of lost revenue with a corresponding dollar of reduction in expense. As a result, net railway operating income has declined to a much greater relative degree than have revenues.

Net railway operating income of the Class I roads of the Eastern District, including the Pocahontas Region, declined from $211,615,325 in the first nine months of 1931 to $143,575,584 for (370) the corresponding period of 1932. This was a decrease of $68,039.741, or 32.2 per cent.

Sheet 5 indicates, for each year from 1921 to 1931, the amount by which the carriers of the Eastern District failed to earn a return of 5 3/4 per cent, based on Ex Parte 74 findings plus subsequent net additions and betterments.

The total shortage under 5 3/4 per cent, for the Class I carriers of the Eastern District, including the Pocahontas Region, for the eleven years combined, was $1,333,208,869.
[fol. 1060] I have now discussed sheets numbered 1 to 5

inclusive, exhibit No. 85. The statistics shown by these sheets, 1 to 5, include statistics throughout for Class I carriers computed upon the basis on which they were operated as of 1930, including in each year's summaries the principal mergers or additions that have been made to the several companies at any time during the period since January 1, 1921.

Because of this fact, the statistics contained in these particular statements are slightly more inclusive as to years earlier than 1929 than the data published by the Interstate Commerce Commission for Class I roads, and so classified in each respective year.

Sheet 6 shows the ratio of net income to fixed charges, for each year from 1925 to 1931. For the Class I roads of the Eastern District, including the Pocahontas carriers, fixed charges were earned 2.09 times in 1925, 2.28 times in 1926, and 2.52 (371) times in 1929. This ratio dropped to 1.88 times in 1930, and was only 1.26 times in 1931. These figures are averages for the Class I roads of the Eastern District as a whole.

Railways of the Eastern District as a whole for the first nine months of 1932, have failed to earn their fixed charges by $25,720,000. That figure does not appear on Sheet 5 of [fol. 1061] this exhibit. It will appear on a subsequent exhibit.

Sheet 7, my Exhibit No. 85, gives statistics of freight and passenger traffic for the years 1920 to 1931, and for the first eight months of 1931 and 1932.

For the Eastern District, including the Pocahontas Region, the peak of passenger traffic was reached in 1920, and freight traffic in 1926.

Revenue ton-miles in 1931 were 30.6 per cent under 1929, and there was a further decline of 26.9 per cent during the first eight months of 1932, compared with the corresponding months of 1931.

Passenger traffic declined almost steadily from 1920 to 1929. The drop from 1929 to 1931 was 25.6 per cent, while a further decline of 22.0 per cent under 1931 occurred during the first eight months of 1932.

Sheet 8 shows the number of cars of revenue freight loaded by all railways of Class I in the Eastern District, including the Pocahontas Region (372), for each week from the beginning of 1929 to the week ending November 26, 1932.

The statistics are drawn from reports of the Car Service Division, American Railway Association.

The statement is in two parts. The left hand section of the sheet shows the figures by individual weeks, while the [fol. 1062] right hand section is cumulative for each year, each succeeding week being added to the preceding weeks of the respective years.

Column 10 shows the percentage decline in each week of 1932 under the five-year average of 1925 to 1929, while column 11 shows the percentage decline of 1932 under 1931. Columns 21 and 22 are the corresponding showings for cumulative periods.

Carloadings for 1931 as a whole declined 30.6 per cent under 1929. For the first 47 weeks of 1932, to November 26, the cumulative decline under 1931 was 26.2 per cent.

Sheet 9 corresponds to sheet 8 in all respects, but relates to the Eastern District, excluding the Pocahontas Region.

Sheet 10 shows, from 1926 to 1931, the gross expenditures made by railways of Class I for additions and betterments. No allowances are made, with respect to these figures, for amounts credited to capital account for retirement of equipment or of other facilities. For the period 1926 to 1931, inclusive, gross capital expenditures made by the Class I roads of the Eastern District, including the Pocahontas Region, aggregated $2,254,725,000.

[fol. 1063] Sheet 11 shows the ratio of railway taxes to revenues. There was an increase in every year, from 1921 to 1930, in all taxes (373) other than Federal income taxes imposed on the railways in the Eastern District, including the Pocahontas Region. There was a slight decline in other taxes as between 1930 and 1931, due to declines in aggregate gross and net earnings of the carriers, which are subject to special levies on earnings in many of the States. The Federal income tax varies, of course, with the amount of the net income and with the rate charged.

The ratio of taxes to total operating revenues showed an almost steady upward trend from 1921 to 1932, from 4.50 cents per dollar of revenue in 1921 to 8.83 cents per dollar of revenue for the first nine months of 1932.

More than one-third of the Eastern carriers' net operating revenue was absorbed by taxes during the first nine months of 1932. This ratio, which stood at 21.22 cents per dollar of net operating revenue in 1929, 24.70 cents per dol-

lar in 1930, and 29.95 cents per dollar in 1931, rose to 35.73 cents per dollar in the first nine months of 1932.

Sheet 12 shows, for the years 1920 to 1931, and for the first nine months of 1932, certain operating statistics for [fol. 1064] railways of Class I in the Eastern District, including the Pocahontas Region. These statistics include the principal items frequently utilized as indices of the operating efficiency of steam railways.

Sheet 13 corresponds to Sheet 12, but applies to the Class I railways of the Eastern District, excluding the Pocahontas Region.

(374) My next exhibit, No. 86, is a mimeographed statement consisting of two sheets, entitled, "Bituminous Coal—tons originated, tons carried and gross freight revenue, Class I Railways, Eastern District, Calendar year 1931."

(Respondents' Exhibit No. 86, Witness Monroe, received in evidence.)

This exhibit shows for each Class I carrier of the Eastern District, including the Pocahontas Region, statistics relating to the tons of bituminous coal handled and gross freight revenue from bituminous coal as reported by each Class I carrier of the Eastern District, for the calendar year 1931.

My Exhibit No. 87 which is headed "Bituminous Coal—tons originated, tons carried and gross freight revenue," is self explanatory. It shows for certain selected railways [fol. 1065] those railways participating in coal traffic moving under reduced intrastate rates in Ohio.

(Respondents' Exhibit No. 87, Witness Monroe, received in evidence.)

My next exhibit, No. 88, shows statistics of property investment and rate of return for 1931.

(Respondents' Exhibit No. 88, Witness Monroe, received in evidence.)

(375) Exhibit 88 shows for nine selected roads and for all Class I roads of the Eastern District, including the Pocahontas Region, statistics of rate of return on total investment for the calendar year 1931.

Exhibit 89 is a statement of one sheet entitled "Surplus or deficit (after fixed charges)," and shows for those railways participating in coal traffic moving under reduced in-

trastate rates in Ohio and for all railways of the Eastern District their financial situation for the first nine months of 1932 compared with the corresponding period of 1931.

(Respondents' Exhibit No. 89, Witness Monroe, received in evidence.)

The statement shows the surplus or deficits after fixed charges.

[fol. 1066] The Class I Railways of the Eastern District, including the Pocahontas carriers (376), for the first nine months of 1932 had a net deficit after fixed charges of $25,720,000, as compared to a net income for the first nine months of 1931 amounting to $69,551,000. These statistics cover the operations of sixty-eight roads or systems.

Out of the total of sixty-eight roads or systems, forty-three reported a net deficit after fixed charges for the first nine months of 1932. These forty-three companies operate 63 per cent of the total mileage of Class I roads in the Eastern group. The total deficit of the forty-three railways aggregated $68,443,000.

The total deficit after fixed charges for the first nine months of 1932 shown on the statement is $25,720,420, and takes into consideration the emergency revenue received by these carriers from the increased rates authorized by the Commission in Ex Parte 103. For these particular carriers of the Eastern group the emergency revenue for the first nine months of 1932 aggregated $28,019,000.

I might say that in regard to the selected roads The Pennsylvania Railroad shows a net income of $6,274,000. The emergency revenue of The Pennsylvania Railroad for the first nine months of 1932 totaled $5,722,000. That was the amount that they had to turn in to the Railroad Credit [fol. 1067] Corporation from the emergency rates, and so far as their cash position was concerned they practically came out even with their fixed charges, their actually retained net income only approximating $551,000 above fixed charges for the first nine months of 1932.

(377) Of the nine roads shown on Exhibit No. 89 seven show a deficit and there is no showing for the eighth, which is the Lorain & West Virginia, a Class II road, for which figures were not obtainable.

The seven individual roads shown on the exhibit as having an operating deficit for the first nine months of 1932

had an aggregate deficit of $29,598,000. All roads in the Eastern District which operated at a deficit reported a total deficit of $68,443,000, so these eight particular roads contributed $29,598,000 of that total deficit. In other words, the Ohio coal carrying roads returned almost half of the entire deficit of the entire Eastern District. The Pennsylvania Railroad had a net income. I am excluding that, speaking of the roads that operated at a deficit. The statement at the bottom of the sheet relates only to those roads that had an operating deficit.

The red figures shown in the surplus or deficit column for 1932 took into account the emergency revenue. If it were not for that emergency revenue the Eastern carriers as a [fol. 1068] whole would have had a net deficit of $53,739,000, instead of a net deficit of $25,720,000 as shown. That emergency revenue provision expires March 31, 1933.

[fol. 1069] Cross-examination.

By Mr. Ballard:

(379) So far as Exhibit 88 is concerned, it is possible to make statements parallel, for the Pocahontas lines from the information contained in that exhibit. The Pocahontas roads as a group can be secured by comparing Sheet 1 and Sheet 2 of my Exhibit 85, which will give the corresponding information as shown on my Exhibit 88. However, from Exhibit 89 the corresponding information for the Pocahontas roads cannot be ascertained. It is available in the files of the Interstate Commerce Commission.

None of the items of Exhibit 89 can be secured from Exhibit No. 85. They are all obtainable in the form there shown from reports on file with the Interstate Commerce Commission. You don't have to make selections from various accounts to put them together. These figures are reported regularly to the Interstate Commerce Commission.

(380) The average miles of road operated for the calendar year 1931 are C. & O., 3118.50; Norfolk & Western, 2259.46 miles; Richmond, Fredericksburg & Potomac, 117.59; Virginian, 593.26 miles.

By Mr. Martin:

On my exhibit 87 I show that the Lorain & West Virginia Railway Company originated 271,082 tons of bituminous

coal during the calendar year 1931. I don't know any of the physical characteristics of those roads at all. This is the information as taken from the reports on file with the Interstate Commerce Commission.

It is stated that the report of that Company to the Interstate Commerce Commission for the year ending December 31, 1931, shows no coal originating on that road during that year. I would have to check that again from the report [fol. 1070] which I took it from at the Commission.

(381) With respect to the questions asked by Mr. Orcutt as to what the effect on revenue would have been if there had been no emergency charges, I took into consideration the business as it was and did not give any consideration to the effect of the application of those charges upon the movement of freight.

(382) With respect to whether figures similar to those shown on my exhibit No. 86 for the year 1931 exists for the prior years back to 1921, they do not, in so far as the gross freight revenue is concerned. The figures do exist so far as the tons originated and carried are concerned but I have shown no such figures.

[fol. 1071] W. R. TRIEM was called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Orcutt:

(383½) W. R. Triem, superintendent freight transportation, Pennsylvania Railroad, Pittsburgh, Pa. I have been employed by that railroad for 23 years, all of that time being spent in the operating department. From an operating standpoint, (384) the western limits of the Central Region are at Crestline and Columbus. The eastern limits are at Altoona, Rochester and Buffalo, and all of the Pennsylvania Railroad between those limits is under my jurisdiction. Transportation from *to* Ohio No. 8 coal district, the Cambridge, Pittsburgh, Connellsville and Fairmont districts to Cleveland, Lorain, South Lorain, Akron, Canton, Massillon and points in western Pennsylvania and New York as far north as Buffalo comes under my jurisdiction.

(385) Generally there is no good reason for the maintenance of a different basis for rates on coal within Ohio than on coal moving from Pennsylvania into Ohio or from Ohio into Pennsylvania, or from West Virginia into Ohio or from Ohio into West Virginia, because the operating conditions are generally similar throughout this territory.

I am familiar with the transportation and operating conditions on our line from Ohio No. 8, the Cambridge, Pitts- [fol. 1072] burgh and Connellsville coal districts to Oil City, Warren, Erie, Buffalo, New York, Youngstown, Titusville and other destinations in the same general territory. In normal times coal has been moving from these districts to the destinations named. During the past two or three years of course the movement of coal to any one destination can scarcely be characterized as substantial. Then too some reservation should be made as to coal moving from the Cambridge fields. I am doubtful if any great quantity reached some of these destinations at any time.

(386) In a general way, from a transportation standpoint, the operating conditions from Ohio No. 8, Cambridge, Pittsburgh and Connellsville coal districts to the destinations named by me are similar to those which obtained in connection with the transportation of coal from the same Ohio and Pennsylvania coal districts to Cleveland, Lorain, Akron, Huron and other destinations in northeastern Ohio. From the Pittsburgh and Connellsville districts loaded trains to all destinations named must move out of the Ohio River Valley against adverse grades, over and along the through east-west dense traffic arteries of the Pittsburgh industrial district. From Ohio No. 8 district to northeastern Ohio loaded trains must move out of the Ohio River Valley against adverse grades, cross over and then move [fol. 1073] along the east-west freight route between Yellow Creek and Bayard, and thence via a north and south rail line similar to other north-south rail lines leading from the Pittsburgh district as previously described. From Cambridge district the operating conditions are more difficult than from the other districts mentioned on account of the adverse grades, bridge and tunnel restrictions that the volume of traffic handled has never justified the removal.

Except from the Cambridge district the type of power used is the same for the movement of the north bound traffic from all these districts to destinations mentioned—our

standard ten-wheel freight engine. Between Cambridge and Bayard (the connection with the main line to Cleveland) a smaller eight-wheel consolidation type engine about two-thirds the size of the standard freight engine is used.

(387 In the assembly of empty cars, the placing at mines, the switching of loads from unconsigned loads, the weighing and classification, there is in general no difference in the four districts named, whether destined to northeastern Ohio or Western New York. This is also true of the scheduled movement on the road to these destinations and the placing of cars at destinations. All shippers and all receivers [fol. 1074] demand the most expeditious and regular handling of all traffic, including coal, with result that none is allowed to wait over until following day or until maximum train loads can be assembled. The type of service provided, therefore, is the same from all of the districts to all of the destinations in order to meet the service of our own competitors and to hold as much coal traffic to our line as possible.

"Q. You stated that in the removal of empty cars and the placing at mines, etc., and other operating conditions, there was generally no difference from the four districts named, whether destined to northeastern Ohio or western New York. Would you include in that answer, or the western or northwestern part of Pennsylvania?

A. Yes, of course, I would include western Pennsylvania."

The following statement describes in a general way routes on our line over which coal is transported from Ohio No. 8, Cambridge, Pittsburgh and/or Connellsville to consuming destinations in northeastern Ohio and in Pennsylvania:

Ohio No. 8 to Cleveland. Mine runs operate from Mingo Junction to Powhatan, a distance of 37 miles, placing at the various mines empty cars of the type, capacity and condition required by the coal operator switching out the billed from unbilled coal and bringing it back to Mingo Yard where it is weighed and classified into trains.

[fol. 1075] For several months there has been only enough traffic to barely justify a train daily from Mingo to Cleveland. This train handles all traffic of every de-

scription for Bayard and beyond, setting cars off at Bayard, Alliance, Ravenna, Hudson on its trip to Cleveland.

The distance, Mingo Junction to Cleveland, is 116.6 miles, ten miles of which between Bayard and Alliance is single track, the balance double track. A single engine train with standard ten-wheel engine contains 3500 gross tons, and this involves use of a helper engine from Yellow Creek to Summitville (17.3 miles) in the midst of heavy west bound movement on this portion of the through east-west freight route between Chicago and Pittsburgh. At Cleveland, train is broken up at Kinsman Street Yard and deliveries are made to consignees direct or to connecting lines by six-wheel yard engines, required by reason of the curvature of and kind of industrial tracks peculiar to industries located along our railroad elevated above street crossings through the heart of the city. There are many such deliveries in Cleveland. In addition, interchanges are made to connecting lines, who in turn made deliveries to consignees, as we are required to do.

(389) The next route described is Cambridge to Cleveland. Cambridge Shop is the assembly yard for the coal [fol. 1076] mined in the Cambridge district. Mine runs operate from Cambridge Shop to Caldwell, a distance of 22.3 miles, placing empties and switching out loads in same manner as described in the Ohio No. 8 district. Mine runs usually weigh the coal at Cambridge scales, 2.5 miles south of Cambridge Shop, and classify the cars for trains to Dover, after which the classified train is brought to Cambridge Shop.

While at no time within the past few years has the volume of traffic been of any magnitude it has varied to a considerable extent. The flow to different destinations also varies seasonably and according to general business conditions, so that the method of handling is constantly changing. Generally a local train from Cambridge Shop to Dover and return is sufficient to handle the business. Another local train from New Philadelphia (immediately southeast of Dover) and running via Bayard to Canton picks up the Cleveland freight and sets it off at Bayard, where it is then picked up by Cleveland Division train from Mingo or a local train operating out of Alliance.

By the use of helper engine out of Cambridge for three miles and "doubling hill" through tunnels at Past Boy

and Stone Creek a single engine train can be loaded to 1770 gross tons. From Dover to Bayard, using standard [fol. 1077] heaviest ten-wheel engine, the tonnage of a single train is but 2300 tons, and, as described before, between Bayard and Cleveland single engine train can be loaded to 3500 tons.

(390) The delivery at Cleveland has already been described.

The next route is Ohio No. 8 to Erie. The assembly service for coal from Ohio No. 8 district destined Erie is, of course, exactly the same as has been described. After assembly in train at Mingo Yard it is moved to Conway. For some time past only one train daily has been required to handle all traffic for Conway and beyond originating at Mingo. The route followed is, branch line, Mingo to Yellow Creek, 19.9 miles, and main line, Yellow Creek to Conway, 28.9 miles. At Conway traffic out of the Mingo train is assembled with other freight for Erie and dispatched via New Castle, Sharon and Conneautville, a distance of 123.7 miles, to Erie, when deliveries are made direct to or through reciprocal switching via connecting lines. Of the 124.7 miles Conway to Erie, 56 miles is single track, the balance double track.

Between Mingo Junction and Yellow Creek a single engine train can be loaded to 7615 gross tons, which determines the train load into Conway, there being no adverse [fol. 1078] grades Yellow Creek to Conway. From Conway the single engine train tonnage is 4820 tons, using helper for 41.5 miles from Sharon to Conneautville.

The next route is Pittsburgh District to Cleveland. Coal from Youngwood, Shire Oaks, Verona and Scully is moved to Conway, thence single engine runs to Cleveland. The lines of the railroad between assembly points in the Pittsburgh District and Conway traverse the Pittsburgh industrial district, through which the through east and west traffic of the Pennsylvania must move.

(391) Coal from Conway to Cleveland must move through the Mahoning and Shenango Valleys, commonly called the "valleys," designating an industrial district in which obtain the railroad operating conditions peculiar to dense industrial development.

Shire Oaks is the assembly yard for our Monongahela Division, and coal produced on this division, as well as that delivered to us at Brownsville by the Monongahela Railroad, is weighed and classified here. Mine runs operate from Shire Oaks, taking out empty cars and working the mines in the manner described as being followed in the Ohio No. 8 district.

Traffic for Conway and beyond is moved to Conway in single engine trains hauling a gross tonnage of 6920 tons [fol. 1079] a distance of 44.1 miles over double or multiple main track railroad. At Conway, after classification, commercial coal is moved to Cleveland in one of three regular scheduled trains daily each following the double track low grade route via New Castle, Niles and Ravenna a distance of 115.8 miles.

With present light traffic the low grade route is preferred and a single engine train will handle 4820 gross tons. It has been found necessary, however, during the past to use the route via Yellow Creek, Bayard and Alliance, which is 125.6 miles, Conway to Cleveland, and single engine train load of 3500 tons with pusher engine required, Yellow Creek to Summitville, a distance of 17.3 miles.

The delivery service at Cleveland, of course, is exactly the (392) same for Pittsburgh District coal as was described for Ohio No. 8.

The last route described is Pittsburgh District to Erie. We have already described the movement of Ohio No. 8 coal via Conway to Erie. The movement of Pittsburgh District coal from Shire Oaks to Cleveland has also been described. It is therefore sufficient to say in outlining the movement of Pittsburgh District coal to Erie that it moves into Conway in exactly the same way that coal destined to Cleveland moves and is handled to Erie from Conway in [fol. 1080] exactly the same way that Ohio No. 8 coal is moved into Erie.

During the past decade the changes in operating conditions on the Pennsylvania Railroad have been of a general character. The necessity of putting their houses in order after return of active management of railroads from government and private control was emphasized by the American Railway Association in various conferences of heads of railroads. The employment of modern business methods of efficiency and economy by large corporations generally

gave impetus to the urge for efficiency and economical operations of the railroads, and the results speak for themselves in reports of the Bureau of Railway Economics, whose statistics prove that a very substantial and very general improvement (393) in operation of American Railroads was made since 1920.

On the Pennsylvania Railroad, and particularly on the Central Region, which embraces the eastern half of Ohio, the western part of Pennsylvania to Altoona and Renovo, western New York to Buffalo, Rochester and Olean, our method of raising the efficiency of the whole region was to inculcate rivalry between divisions and thereby make sure that each division makes its proportionate contribution in improvement. From statistics of operation which I have today consulted I find that each division of the Central [fol. 1081] Region concerned with the movement of coal from the Ohio and Pennsylvania fields has improved its methods of operation in almost the same proportion over the past ten years.

The changes in operating conditions, as I have just said, have been general and apply to routes in Ohio as well as in Pennsylvania. Generally, there has been no change in operating conditions affecting interstate traffic that were not met by changes affecting intrastate traffic, or vice versa.

Cross-examination.

By Mr. Ballard:

On our route (394) from Cambridge to Cleveland the next train terminal after Cambridge is Dover. Sometimes we run double-headers from Cambridge to Dover, but not generally. When we do we use an 8-wheel consolidated type of engine, known as our H-10. The theoretical rating of two such engines would be twice what I have shown here, about 3500 tons, I should judge. I gave 1770 tons for one of them. I don't think in actual practice we handle 4000 tons with two engines.

In expressing my opinion of relative operating conditions in the three states, I did not include all of Pennsylvania. (395) Of course I would not care to make that [fol. 1082] statement as applying to the movement of traffic over the so-called mountains. I am speaking of

western Pennsylvania and only that portion of West Virginia served by us, known as the Pan Handle which extends up between Ohio and Pennsylvania, including Weirton and Chester and that territory. I am not talking about the Fairmont district. Ohio, west to and including the Cambridge district has the conditions I described. In expressing that opinion as to relative operating conditions I did not have in mind the return movement of iron ore in connection with the movement of coal. I did not give any weight to that. Without respect to that consideration, the conditions are generally similar in the two states.

In my analysis of the situation I separate the assembly problem from the road haul problem and consider that the assembly conditions (396) are the same on coal in the three states. Also that the road haul service is generally the same. That is, a mile of service in one place is about the same on the average that the mile of service in another place in this area is.

By Mr. Martin:

Q. Mr. Triem, your company also transports ex-river bituminous coal from Conway, Pa., and Mingo Junction, Ohio, to Cleveland, Canton and Massillon, Ohio, does it not?

(Objection was made by Mr. Orcutt, on the ground that testimony (398) on transportation conditions on interstate coal moving ex-river. was irrelevant to this proceeding. [fol. 1083] Examiner Trezise stated (399) that in order to reach a proper conclusion it was necessary to know about the transportation conditions on interstate as well as state commerce and that the witness might testify concerning transportation conditions generally on interstate commerce. Mr. Orcutt renewed his objection (402) and preserved an exception.)

(402) The Pennsylvania Railroad Company has a transfer plant at Conway, Pa., for the transfer of ex-river coal from barges to railway cars. I don't know the capacity of that plant.

(403) The loaded cars of ex-river coal are moved by yard engine at Conway, weighed and placed in westbound trains at Conway, after which the movement is exactly

the same as described in the movement of Pittsburgh district coal, Conway to Cleveland—that is, it is handled in the same train as the all-rail coal from Conway to Cleveland. (404) There is no difference either in the road haul or delivery service as between the two classes of coal. The work of the Pennsylvania Railroad at Conway includes the placing of the empty cars at the transfer plant as well as the removal of the loaded cars therefrom.

[fol. 1084] The answers I have made would not apply to the movement of ex-river coal from Conway to Canton and Massillon. That movement would be made in trains destined to Canton or moving in local service over the Eastern Division.

(405) I know of no movement of any river coal from Conway to Canton and Massillon during the past 30 days. Of course the facilities at Conway are very new and I am not really familiar with the capacity or the exact method of handling, so that if any quantity of coal were to be moved it would be quite different from an occasional 10 or 15 cars. In other words, if the barges were to come in there in such number with such an amount of coal as to make it necessary to employ additional yard engines, additional men to take care of the weighing, and the westbound trains over the Eastern Division were insufficient to handle the coal, then my description of it would be quite different from the theoretical description of a movement of one or two cars a day out of Conway.

(406) I have seen the transfer plant at that point, and I have a rough idea in my mind as to the capacity, but I would not dare use it, because I am not positive whether it is 8 or 15 or 20 cars in an eight hour trick or not. I have not heard the figure of 100 tons per hour used as the capac-[fol. 1085] ity of that plant. I had in mind that if it was running somewhere near 30 or 40 cars a day, additional help would have to be employed at Conway. Assuming that the capacity of the plant is 100 tons per hour, that would mean it would afford about two cars per hour to the railroad.

(409) Q. Mr. Triem, will you please describe and compare the manner in which ex-river coal would be handled from Conway to Canton and Massillon compared with all-rail coal from the same point, Conway, to these destinations on the assumption that you receive at Conway approximately two cars of ex-river coal per hour.

A. Well, the movement from Conway to Canton and Massillon of ex-river coal would be exactly the same as the movement of coal from territory served by trains coming into Conway, as previously described. As to the terminal service at Conway required in the handling of the ex-river coal, I can hardly hazard a good guess as to exactly how we might handle it. It would depend entirely upon a variety of conditions. The road haul service and the destination delivery service of the two kinds of coal from the time that they leave Conway would be exactly the same.

(412) The movement of ex-river coal from Mingo Yard to Cleveland is exactly the same as described for Ohio No. [fol. 1086] 8 coal from Mingo to Cleveland, and that statement includes both the road haul and the destination delivery service at Cleveland.

By Mr. Burgess:

In discussing the operating conditions in connection with the movement of coal from Cambridge District mines on our road to Cleveland, I referred to certain operating difficulties which held down our engine rating to 1770 tons of coal. There are three major adverse grades between Caldwell and Bayard, two of them south of Dover and one north of Dover, and each has about the same general effect so far as the tonnage of the train over that railroad is concerned. However, the condition of the railroad between Dover and Bayard is very much better than the condition of the railroad south of Dover, and larger locomotives can be used north of Dover, although we seldom do so.

If tonnage were offered from Dover north, and a larger engine were used (413), the engine rating would be 2300 tons with a 10-wheel engine.

By Mr. Keeler:

Q. Mr. Triem, you stated the manner in which the coal is handled from the Pittsburgh District and also the coal coming off the Monongahela Railway, but I did not catch whether you included also the coal coming from the Con- [fol. 1087] nellsville District?

A. Well, of course the coal coming off the Monongahela Railway.

We have some mines of our own, I would say, in the Connellsville district, because Shire Oaks, Youngwood and Brownsville are the locations through which that coal would move.

Q. From your own mines, now, the ones that are local to the Pennsylvania as distinguished from mines on the Monongahela, which of those points would the coal go to in the first instance?

A. I am afraid I could not answer, I would not be able to answer the question as to where there is a mine in the Connellsville District located adjacent to our track (414).

Q. They are all on the Monongahela Railroad, are they, you have no mines local to the Pennsylvania in the Connellsville District?

A. I am sorry, but I will have to say I don't know.

By Mr. Gutheim:

The line of the Pennsylvania Railroad that handles the coal into Shire Oaks and then into Conway is a two or multiple main track modern railroad. It is substantially a water level line. I think I remarked that we handle between 6900 and 7000 tons in a train in that territory.

[fol. 1088] As I remember it, the grade conditions on the line over which the coal assembled at Youngwood moves up to Conway are a trifle more adverse, but the general character (415) of the railroad is of the best. It is a modern, multiple track railroad. About the time we get to Pittsburgh proper that Youngwood coal also travels the same water level line.

The line that handles the coal going down through Verona follows a multiple track modern railroad and the grade is not adverse. On our line crossing from Pittsburgh to Steubenville, we have a different situation—a cross country undulating line. That is also true when we cross the Ohio River and go west through No. 8.

The line from Conway going north into Youngstown we would consider a secondary class divisional main track. Part of it is automatic signals, part of it is not. The grades are increasingly adverse the further north you get. It is a water level route, follows the Beaver Valley.

(416) We have two different lines running through the Pittsburgh District; the one through the East End, the so-

called Pittsburgh Division main line runs east through East Liberty, Wilkinsburg and Pitcairn, which is a multiple track, four and six track railroad with heavy adverse grades [fol. 1089] all the way from Pittsburgh to the top of the mountain at Gallitzin. That is in the easterly direction and is a line of very heavy density, about the heaviest on the system.

Conway, Rochester and Yellow Creek to Canton, Massillon and Akron is the westbound route from Conway. Part of it has been constructed within the last 12 or 15 years.

[fol. 1090] (417) The Canton-Bayard Cutoff was built about 12 or 15 years ago. It was a freight line, socalled cutoff to avoid the traffic interference and grades on the route between Canton and Rochester through Alliance. The Fort Wayne main line route from Canton through Alliance and down east through Salem is an undulating cross country route with grades, and movement over that route is escaped by the use of this Canton-Bayard Cutoff which permits us to take the freight via the route from Rochester through Yellow Creek and Bayard without the same adverse grades.

In this section of Western Pennsylvania that is on our line south and east of Conway, there are a large number of blast furnaces, iron and steel mills (418). They extend on our easterly line from Pittsburgh and also our southerly line from Pittsburgh, they are large consumers of iron ore.

Most of the iron ore from Lake Erie ports goes over the Bessemer & Lake Erie to the "Corporation." In so far as we do have iron ore to move, it goes down over these same rails from Cleveland and Ashtabula into this Pittsburgh furnace iron and steel territory.

In my answer to Mr. Gutheim's question where he asked if the line between Yellow Creek and Bayard did not have the same grades as the Fort Wayne route, I said that we escape those grades. That was not entirely correct, be- [fol. 1091] cause there is a very heavy grade about 17 miles long requiring helper service between (419) Yellow Creek and Summitville on that socalled cutoff line. There is no question but that the purpose of the investment in the cutoff line was to give us better operating conditions than we formerly had.

Redirect examination.

By Mr. Orcutt:

I do not know the cost of the Bayard Cutoff.

[fol. 1092] JOHN HEWES was called as a witness and having been duly sworn, testified as follows:

Direct Examination.

By Mr. Webber:

(420) I am Transportation Assistant with the Balitimore & Ohio Railroad. My duties consist of the formulation of both freight and passenger schedules to meet the service required, distribution of freight cars and passenger cars. I have been connected with the Transportation Department for eight years. I am a practical engineer, not a graduate engineer. I spent eight years in the engineering and survey and construction department and eleven years in the maintenance of way department prior to my entry into the operating department eight years ago.

(421) My jurisdiction includes the territory we have been talking about here generally, that is, Ohio, Pennsylvania and West Virginia. I am familiar with the transportation and operating conditions on the lines of the Baltimore & Ohio in Ohio and Pennsylvania and in West Virginia.

Q. Now taking those three states, as you cross the state line in connection with the operations say from Ohio into Pennsylvania, or Ohio into West Virginia, is there any transportation reason for the maintenance of a different basis of rates on coal within Ohio than on coal moving from Pennsylvania or West Virginia into Ohio, or from Ohio into Pennsylvania or West Virginia?

A. Generally speaking, no. I know of no difference in the terrain, in the particular localities which you cite that would materially affect the operating conditions as between one state and the other.

[fol. 1093] I am familiar with the transportation conditions from the Number 8 Field to Northeastern Ohio. With respect to a movement from the Number 8 Field in Ohio

over the Baltimore & Ohio to Cleveland, I first of course deal with the assembly service necessary. (422) After the assembly I would start on the road haul movement at Bridgeport, Ohio. I have made no accurate study of the actual distances that would be required by such assembly service. That of course changes from time to time. I would say that at the present rate of production of what might be termed the active mines in that territory now, this assembly service would average about 8 miles. We start with Bridgeport on the road haul movement as an assembling point.

(423) From the Number 8 District the distribution of empty equipment at the mines and gathering up of the coal is performed by locals or mine district runs left at convenient points to be picked up by a through train or all brought into Benwood, Bridgeport or Bellaire for movement in through trains to Holloway, where it is weighed and billed. That portion of the movement just mentioned by me, however, from Bridgeport to Holloway is considered a portion of the road haul movement and not the assembly service. The distance from Bridgeport to Holloway is 30.9 miles. The road haul between those two points is under ordinary conditions accomplished with a single engine handling 6300 tons, or with the assistance of a helper from Bridgeport to Flushing, a distance of 25.8 miles there [fol. 1094] can be handled 9,540 tons with what we term a Mikado helper, or 10,000 tons with what we term a Mallet helper. A maximum grade between those two points, I should say, is .5 against the loaded movement. It is single track with the exception of 5.9 miles. From Holloway to Lester is a distance of 99.7 miles, and from Lester to Cleveland, which completes the trip I am describing, the distance is 26.7 miles additional. From Holloway to Lester the maximum grade against the load is .4 of 1 per cent. There is between these two points 41.9 miles of double track. Between Lester and Cleveland the maximum grade against the loads is .45 of 1 per cent, all of which is single track. On account of certain bridge restrictions on (424) that portion of the line, Lester to Cleveland, a through train dispatched out of Holloway destined to Cleveland can only handle 2900 tons on account of light power necessary to be used between Lester and Cleveland, due to the bridge restrictions I have mentioned.

However, I might add it is possible to handle out of Holloway as far as Lester, Ohio, 10,000 tons, or a continuation of the same operation from Bridgeport to Holloway, only that there is no helper service required between Holloway and Lester or Cleveland.

That, I think, is about all I could add to the description of the assembling and assembly service and the movement of the traffic from the number 8 field to Cleveland.

[fol. 1095] I am familiar with the movement out of the Fairmont District to Cleveland. The Fairmont field, of course, is what might be termed a much broader field, that is, it covers more square miles than the Number 8 field. However, the assembling points are more in number than in the Number 8 field, which cuts down to a certain extent the preliminary assembling service required, and I have not made recently any accurate study of the assembling (425) service necessary, but I would say, from my personal knowledge, that the assembling runs in the Fairmont District are likewise about 8 miles in length.

In describing the movement of coal through to Cleveland from an assembly point in the Fairmont District, you start at Fairmont. In order to handle the matter in a better way, I have in a way subdivided the Fairmont District into what we operating people call fields. Empties for mines in what we term the Flemington field, which is just west of Grafton and the loads produced at those mines are gathered up by turn-around district runs operating out of Grafton and brought back into Grafton and sent to Fairmont by through train for training up and dispatchment. I am speaking, of course, of traffic destined to Cleveland. Coal from what we term the Wilsonburg field and the necessary placement of empties for same is gathered up by turn-arounds operating out of Clarksburg, West Virginia or Lumberport, and brought into Short Line Junction, which is really West Clarksburg or Lumberport (426), from [fol. 1096] which point it is picked up by through trains operating out of Clarksburg or Fairmont. The distribution of empties and coal from mines in the immediate vicinity of Fairmont Yard which by the way includes mines in the Farmington region, mines on our Paw Paw Branch and the upper end of the Monongahela Railroad is brought directly into Fairmont Yard, where it is switched up and dispatched in through trains. In the territory between Fair-

mont and Lumberport, or what is known as our Monongahela subdivision, the distribution of empties and the movement of the loaded cars of coal is performed by various mine runs and assembled at convenient points between Fairmont and Lumberport, at which point it is later picked up by through trains dispatched out of Fairmont.

As to the road haul movement from Fairmont to Cleveland, for operating convenience, I have divided this route up into various sections the first of which is the movement from Fairmont to Lumberport which is accomplished over single track railroad having practically a river grade, 19.7 miles in length. The maximum grade in the loaded movement is .5 of 1 per cent. A single engine can handle 6,650 tons from Fairmont to Lumberport; or 10,000 tons with the assistance of one helper. From Lumberport to Hartzel, a distance of 13.7 miles, the same tonnage can be handled with the assistance of a single helper, namely 10,000 tons, the maximum grade being .5 of 1 per cent against the loaded movement, all of this route being (427) single track. [fol. 1097] From Hartzel to Benwood Junction, a distance of 68.2 miles, the rating is likewise 10,000 tons with a single engine, this being partly a river grade and partly a descending grade in favor of the loaded movement, and the maximum grade against the load being only .3 of 1 per cent. In this particular territory there is but 2.1 miles of double track. From Benwood Junction to Holloway, a distance of 35.6 miles, with the assistance of a single helper, this same train can continue through with 10,000 tons rating, there being but 5.9 miles of double track on this stretch of track, the maximum grade against the loaded movement being .5 of 1 per cent. From Holloway to Cleveland, of course, the same conditions pertain as previously described regarding the movement from the Number 8 field to Cleveland. The movement from Holloway is the same whether the coal comes from Fairmont or from Bridgeport. Over the same piece of track, as a matter of fact, it is the same from Bridgeport to Cleveland in both instances.

[fol. 1098] (428) I can see no difference whatever in regard to the operating conditions between the two routes I have described, which move coal to Cleveland, one from Fairmont and one from Bridgeport, No. 8. The movement from Fairmont to Cleveland is really a continuation of the

same operation, Bridgeport to Cleveland. As indicated by my description, we can move the same train out of Fairmont to Cleveland as we can from Bridgeport to Cleveland. The only difference is one of mileage. There is an additional haul from the Fairmont field of about 100 miles.

Q. Now within your knowledge, say within the last ten years, has there been any other than general changes in operating (429) or transportation conditions on the Baltimore & Ohio in the states that I have mentioned?

A. I should hope to think that we have progressed in the past ten years in the matter of efficient and economical operation, but at the same time I think that such progression has been general and on an even level and not confined to any one particular locality, as regards whether it may be interstate or intrastate. I mean by that that we have not confined all of our improvements to any one locality; but we think that we have improved the general operating efficiency equally over the Baltimore & Ohio System.

[fol. 1099] Further cross-examination of Witness Triem.

By Mr. Keeler:

Q. Mr. Triem, I asked you a question this morning with regard to movement of coal out of the Connellsville District. I have since handed you a map showing the Connellsville rate district and also a list of the mines that (430) are local to the Pennsylvania Railroad in that district. Would you state how the coal is handled from those mines in the Connellsville District?

A. Those mines of which you gave me a list are located between Brownsville and Connellsville, both sides of Uniontown, both east and west, as I remember it, and I think a general answer would be to cover all of that territory that all mines located on our line south and east of Dunbar, the coal is moved via Brownsville and Shire Oaks, and all coal north of Dunbar is moved through Youngwood. In either case my description of the movement of coal from the Pittsburgh and Connellsville Districts covered the movement beyond Shire Oaks and Youngwood.

By Mr. Gutheim:

The originating territory that I described lays back up from the river.

Cross-examination of Witness Hewes.

By Mr. Ballard:

My jurisdiction does not extend over the Baltimore & Ohio System. (431) My eastern limit would be Cumberland, Maryland, and my western jurisdiction would be Wil- [fol. 1100] lard, Ohio, on the one hand, and Newark, Ohio, on the other. In addition to that, I have lately acquired the B. R. & P. and the B. & S. territories. South I take in all of West Virginia, Charleston, Huntington.

Willard is practically on the Sandusky-Galion line. Newark is just east of Columbus—about 22 miles directly east of here. (432) Willard is about 117 miles north of Newark on the line drawn from Newark to Sandusky.

On the south my jurisdiction extends to the southern limits of the system, and to Charleston. My general testimony with respect to transportation conditions in those three states affect the rates pertaining to that territory.

(433) In expressing my opinion as to whether the transportation conditions in the three states would justify any different rate basis, I referred both to assembly as well as line haul service. In that opinion, I did not give any weight to the return movement of iron ore.

In the train loadings I gave, that is the rating of the engine, or the tractive power of the engine used in that particular service, it being considered that that is the most economical class of engine to use. From Bridgeport to Holloway our train rating is 6300 tons. (433) That is an adjusted factor. An adjusted factor is an adjustment as regards the tonnage as we figure it—an additional tonnage added to the actual weight of the car and contents and compensation for weather resistance of the rail and axles. That does not vary with the number of cars. It would be the same on a 25-car train as on a 100-car train. That is to say, on a train [fol. 1101] of 100 cars there would be no greater adjustment per car. The adjustment factor per car is different (435) on different divisions and under different conditions. Taking a temperature above freezing it varies from 7 tons per car to 22 tons per car. It also varies with the class of railroad over which we are operating. We have higher adjustment on main line traffic where it is required for the train to move at a faster rate than we do on branch lines

or unimportant stretches. The adjustment is expressed in tonnage, so much in tons per car.

Q. This record shows some distances measured from active mines in various districts to the destinations about which you have testified. Generally speaking, would the length of the assembling service that you testified to diminish the length of haul from the mines to destinations by the amount stated?

A. In some instances, as I stated, if the mine happened to locate between the origin and destination, your road haul service would in some cases diminish that much. In the cases where it would not be diminished it would be, for operating or other reasons, that that assembly service was performed at this particular mine (436) and in a way back-hauled to the origin road haul point. The distance would not be measured through the assembling point from the mine. The length of the assembling service would not in all instances represent a deduction from the length of the line haul.

[fol. 1102] (437) The Baltimore & Ohio handles ex-river coal from West Wheeling, Ohio. As to its destinations, I cannot definitely state. The only destinations I am familiar with, having viewed the movement, is to Cleveland. Whether there is to Cleveland, Lorain, Canton, and Massillon, Ohio, I cannot state.

West Wheeling is a mile and a half down the Ohio River from Bridgeport, on the Ohio side. At West Wheeling for the reception and handling of ex-river coal we have one track lying along the Ohio side, or the west bank of the Ohio River. That is the only facility we have for that purpose. The coal is transferred to car on that track by means of derrick boats.

(438) From my limited observation, inasmuch as this facility has only been in operation for a short time, I can see no material difference between the service rendered as against assembling and road haul movements of this coal, compared with assembling and road haul movement of the all-rail coal. My answer refers to the movement from Bridgeport to Cleveland, and also applies to the destination delivery at Cleveland.

By Mr. Tefft:

Q. Do you know of any operating or transportation con-

ditions surrounding the movement of coal from southern Ohio mines into northeastern Ohio and northwestern Ohio which would justify any higher level of rates from these southern Ohio mines to Toledo than to Cleveland?

[fol. 1103] A. My personal opinion would be that there would be no justification for any, based on my limited knowledge of operating conditions in the two sections, as you have described. I am speaking from a transportation standpoint.

(439) My understanding is that all the Cambridge coal that the Baltimore & Ohio moves to the Cleveland, Lorain, Akron and Massillon territory moves out through Bellaire and then up through the Number 8 District, along the lines that I have described. If I am in error as to tariff routes, why I stand corrected. When we reach the river with that coal we also have the Fairmont coal and we pull both of them up through Number 8, with Number 8 coal.

By Mr. Gutheim:

Q. Does it follow that your traffic density from your junctions at about Wheeling and Bellaire going north is greater than the traffic density up to that common point?

A. The traffic density, I would say, from Bridgeport to Cleveland is of course supplemented and increased by the traffic coming in from the Cambridge field and from the Fairmont field.

(440) We serve the steel industries in Pittsburgh and the Mahoning and Shenango Valley districts, and also the industries in the Wheeling District.

The traffic density on our line from Bridgeport to Cleveland is heavier than on the line south of Bridgeport, with the exclusion of what traffic out of Fairmont may be routed westerly out through what we call the Newark Division to Newark, Columbus and Cincinnati. I would say that from [fol. 1104] Bridgeport north would be on a parity with that route to Fairmont and what we term New Martinsville, which is where our Ohio River Division leaves. Between the latter and Bridgeport (441) those two lines of traffic are consolidated in the same facilities up from New Martinsville, there is but one line of traffic from the Clarksburg and Fairmont region.

We handle iron ore from Lorain over this main line down into Wheeling from Bridgeport. Over the B. & O. rails

is the natural route for iron ore to the Wheeling district. I would not say that in normal times the movement of iron ore is heavy over that division, but it is substantial. There being a limited number of industries in Wheeling, it is not comparable with the Youngstown region.

The line from Lester to Bridgeport runs through Massillon.

(442) The mines located in the Wheeling district are on the main line of the division running from Bridgeport to Cleveland, with the exception of some located on short branch lines or spurs. Most of them are on the main line.

It is not the usual practice in connection with the assembling service at the mines in the Wheeling Creek District to move the coal back into Bridgeport and make up the trains there. There are occasions when, for operating reasons, it is brought back into Bridgeport and trained up to eliminate the stop of the through road train. The usual operation is to stop the through road train and pick up the cars of coal at the mines along this division, where they have been previously assembled at convenient points.

[fol. 1105] The same crews that assemble the coal in the Number 8 District assemble other freight for transportation and make-up into our road trains. I would say, with reservations, (443) that in normal times there is considerable quantity of other freight as well as coal. We do not have crews in the Fairmont District that are strictly assigned to assembling coal. They will assemble all traffic offered by any and all industries as well as coal operators in the territory over which they operate. There are, however, fewer diversified industries possibly in the Fairmont District proper. The assembling service consists very largely of coal, although there may be some other commodities.

Our connections with the Monongahela Railroad are what we term Rivesville Junction at Fairmont and Leckrone, which is in the Connellsville District, lies between Brownsville and Smithfield, Pa.

All the coal off the upper end of the Monongahela, in other words, from the West Virginia-Pennsylvania state (444) line to Fairmont, is delivered to us through Fairmont, rather than through Leckrone. I don't know whether I can really state why that is. I think possibly it is a ques-

tion of division. We get a bigger division out of that route rather than through Leckrone. It is a rather expensive operation for the Monongahela to deliver us traffic at Leckrone. There are adverse grades out of the Monongahela Valley up into Leckrone; from Brownsville up what they term their Dunlap Creek Branch to Leckrone is a very [fol. 1106] difficult operation. That is wholly within Pennsylvania. (445) We do not have that condition on the Monongahela south of the state line. They have the advantage of the river grade in that territory up to their delivery to our line at Rivesville Junction.

I am reminded that I stated we moved our coal from Bridgeport to Holloway where it was weighed. I could not state definitely the exact location of Holloway, not knowing the limits of the No. 8 district as referring to our line between Bridgeport and Holloway.

By Mr. Herrold:

(446) Q. If coal should originate on your line at Maynard for Barton or any point west of Bridgeport and destined to Cleveland, do I understand you would haul that coal into Bridgeport and then back-haul it to Holloway, where you would weigh it?

A. Let me again explain, as I did to Mr. Burgess, under what conditions we might back-haul into Bridgeport. Bridgeport, as I stated, is located right where I have my pencil. We have a mine just a short distance out of Bridgeport, and in response to Mr. Burgess' inquiry I told him that there were some instances when that mine district, working in that territory, and it was convenient for that run to bring that coal back into Bridgeport where it is picked up along with other loads by through trains, it was [fol. 1107] done, and we considered that advisable, as it eliminated the necessity of having a through road man out of Fairmont to New Martinsville and Benwood Junction stopping (447) there and being delayed picking it up at that point. That back-haul is rather negligible as concerns mileage, however.

It is simply this, from Bridgeport to Holloway is quite a heavy grade and it is expensive to stop through road trains to pick up, therefore, within a very short distance of that mine which I have described, it is usually more economical for us to come down the hill with those few cars

of coal that that district run may pick up, and put them in the Bridgeport Yard along with other loads at a point where it is easy for road trains to pick them up, rather than stop a road man on the side of the hill to pick them up. We reach the crest of the hill 5 miles east of Holloway at a point called Flushing Tunnel.

(448) I could not say whether or not we have any track scales at Bridgeport, but we have never to my knowledge used them for the weighing of coal. If there are such scales they are of a flat type and necessary to spot cars on for weighing. In our Holloway yard we use a hump in weighing coal, but we have no hump in Bridgeport.

I testified that the distance from Bridgeport to Holloway is 30.9 miles.

[fol. 1108] Q. In the No. 8 District your assembling district ranges, as I understand, about 8 miles, and you use one engine there for that purpose. Your mines in the No. 8 District are pretty well consolidated. So far as the district as a whole is concerned, your mines are located within a comparatively narrow range?

A. Based on the present active mines they are quite compactly located at the present time. However, in times of prosperity our No. 8 field was rather extensive in length and there were some points in it that an assembly service was rather expensive.

(449) I stated in my direct testimony that the Fairmont field covered a larger territory, based on square miles. However, the number of sub-assembling points is more in number than in the No. 8 district. In our Fairmont District we weigh the coal at Holloway, on traffic destined to Cleveland. If it is destined to points this side of Holloway we would of course weigh it at some other point. It might weigh at Fairmont or Benwood Junction. We do not have a hump yard at either of those junctions. Those are flat yards.

(450) We assemble coal destined to Cleveland at Grafton and Clarksburg if there is any. In the Flemington region, to Cleveland and Toledo it is brought into Grafton. [fol. 1109] If from the Wilsonburg District it will be brought into Clarksburg or Lumberport.

Coal in the Wilsonburg District is assembled at Short Line Junction or Lumberport, from which point it would be picked up by through trains enroute from Clarksburg or

Fairmont to Cleveland. There would be no classification at any other point between Short Line Junction or Lumberport and Cleveland except Holloway.

These various assembling points we have in the Fairmont District are comparable with the method of operation (451) we perform on the C. L. & W. Take for instance, Monongah, a mine run district crew will switch a number of allotted tons in that territory and leave what he gathers up for Cleveland at convenient passing sidings where it is picked up by the through man enroute to Cleveland, just the same as it is picked up by the C. L. & W. on trains dispatched out of Bridgeport for Cleveland. There is no additional or supplemental assembly service necessary after these mine run district crews have assembled this coal and placed it on a convenient passing track or storage track in the vicinity. It is ready for road haul movement then.

We do not have to contend, in and about Fairmont, with steep grades. Our lines of railroad, in the main, follow river grades. That is not true in the No. 8 district. We have adverse grades in the St. Clairsville territory and as [fol. 1110] respects our main line from Bridgeport to Holloway, a portion of that road requires helper service.

We do have some grades around the Fairmont District where we assemble coal—from any mine that might be located on a spur or a branch. Not all of our mines are located on river grades.

(452) Mr. Webber: May the record show, Mr. Examiner, that Mr. Herrold, in questioning Mr. Hewes, has referred to a map which is not a part of the record here, although he intended to refer to Exhibit No. 22. Is that right?

Mr. Herrold: That is right. Exhibit No. 22 is the same map that I referred to except it contains more information. It contains the information I used on the map I showed Mr. Hewes and also additional information.

Mr. Weber: For the information of Mr. Herrold, may I ask Mr. Cochran to state from his seat just whether Holloway is in the No. 8 District—he has already testified?

Mr. Cochran: Holloway Yards are just west of the most westerly mine taking the No. 8 rate on the C. L. & W. Branch of the Baltimore & Ohio Railroad.

Mr. Herrold: That is what I wanted. It is just outside of No. 8 District.

[fol. 1111] J. ELMER MONROE, having been previously sworn, was recalled as a witness and testified as follows:

When I was on the stand Mr. Martin questioned the figures on my Exhibit No. 87 showing the tons originated (453) on the Akron Canton and Youngstown, the Erie and the Lorain & West Virginia. I have just received word from Washington saying that the figures are correct in accordance with the report on file with the Interstate Commerce Commission. The figures for the Lorain and West Virginia represent figures for all freight. The figures should read for bituminous coal as follows: Tons originated 90; total tons carried, 580,097; gross freight revenue, $136,697. In other words, these corrections reduce the figures for the Lorain & West Virginia from approximately 274,000 to 90,000. The figures I have shown show the total tonnage of all freight as well as the gross revenue of all freight.

[fol. 1112] CHARLES H. HEINISCH was called as a witness and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Day:

(453) I am connected with the New York Central Railroad as transportation assistant. (454) I have been in the Transportation Department of the New York Central 30 years, with the exception of three years when I was chief clerk to the Superintendent of Transportation of the M. K. & T. Railroad. My headquarters are in Cleveland, Ohio. I am familiar with transportation and operating conditions on the lines of the New York Central in Ohio and Pennsylvania.

Generally speaking, taking the state of Ohio and Pennsylvania as you cross the state line in connection with those operations, there is no transportation reason for the maintenance of a different basis of rates on coal within Ohio than on coal moving from Pennsylvania into Ohio or from Ohio into Pennsylvania.

I am familiar with transportation and operating conditions on our line in connection with coal originating in Ohio No. 8 district, Pittsburgh and the Connellsville district to

Oil City, Warren, Erie, Buffalo, N. Y., Youngstown, Titusville and other destinations in the same general territory.

(455) We have a substantial movement of coal from the fields mentioned to points Erie, Buffalo and other destina-
[fol. 1113] tions, particularly originatng on the P. & L. E.

Q. Will you state whether, from a transportation standpoint, the operating conditions from Ohio No. 8, Pittsburgh and Connellsville coal districts to the destinations you have named are similar to those which obtain in connection with the transportation of coal from the same Ohio and Pennsylvania coal districts to Cleveland, Akron, Lorain, Canton and Massillon, in northeastern Ohio?

A. Coal which we receive off the P. & L. E. for points such as Erie, Pa., and Buffalo, is handled under more favorable conditions than coal originating in the Ohio district, in trains made up Minerva for points, Cleveland, Ohio, Lorain, Elyria and that territory.

Minerva is our scaling point on our Alliance Division, which serves our No. 8 and Middle districts. It is the assembly point for coal originating in those two districts.

I am asked to describe the route (456) of the New York Central over which coal is transported from the Ohio No. 8, Pittsburgh and Connellsville Districts to consuming destinations in northeastern Ohio and in Pennsylvania, discussing briefly both the assembly and the line haul service.

We have no direct assembly point in the Ohio No. 8 District. This district s served by Minerva, Ohio, equip-
[fol. 1114] ment being classified and assembled at Minerva and the so-called mine runs take along empty equipment ordered for the following day's loading. After the necessary switching is performed at these mines in the No. 8 District these mine run trains are moved to Minerva, a distance of 46.22 miles from Dillonvale, at which point cars are scaled, billed, switched and classified.

At Minerva these cars are made up in trains for Cleveland terminal points, trains being properly classified for expedited service. On arrival of this train at Marcy the cars for Cleveland and connections and points east are dropped, and cars handled in puller to firms and connections. The balance of this train continues to Rockport, Ohio, on the west side of Cleveland, and cars for firms and connections in this territory are also served by puller service.

In the service between Minerva, Ohio and Cleveland, the practice is to use standard power, and the engine rating calls for 3600 gross tons. However, these trains are assisted approximately (457) 50 per cent of the distance with a large engine to Hugo. These train- approximate 6700 tons with double-headed power.

Naturally, under this operation; this extra power is run light from Hugo to Minerva on the return movement. That is a distance of approximately 37 miles.

[fol. 1115] In that case we need an extra flagman to comply with the state law. Coal which originates in the Ohio No. 8 District for Erie, Pa., or points east thereof would be handled as described previously to Marcy, and from Marcy it would move in puller service to Collinwood, our main line, and from Collinwood it would be handled in proper destination main line trains.

The main line of the New York Central between Collinwood and Buffalo is operated on a car basis not to exceed 125 cars per train. However, if we have a solid train from Collinwood for points east, this could be handled in units of 7500 tons.

On the movement from the Pittsburgh District, coal trains arrive in the P. & L. E.-N. Y. C. joint yard at East Youngstown with approximately 8500 ton units, and are dispatched with approximately 7500 tons destined to points Erie, Pa., and Buffalo, train moving via our low grade route, on the Franklin Division to Ashtabula and east therefrom over our main line known as our Erie Division.

(458) These trains leaving Youngstown are assisted to Doughton Junction, a distance of about 6 miles, by yard power, train for Buffalo, a distance of 190 miles, without additional helper service.

[fol. 1116] Coal originating on the Pittsburgh District destined Cleveland is delivered to the New York Central Railroad at Struthers, Ohio, in the vicinity of Youngstown, Ohio, and from Struthers this train would move over the L. E. & E. to Girard Junction, thence through Niles Junction, Brady Lake, Marcy, Rockport and terminate at Elyria, Ohio.

The coal for Cleveland would be dropped at Marcy, Ohio, and Rockport, Ohio, and deliveries would be made in a similar manner as previously explained on coal from the

No. 8 District. These trains are operated with standard power over this route, with a loading order of 4500 tons.

[fol. 1117] Cross-examination.

By Mr. Ballard:

(458) The extent of my jurisdiction is west of Buffalo to Chicago. It extends south as far as Charleston and as far as Swiss, and includes the old Kanawha & Michigan, (459) and the Ohio Central. The New York Central has recently acquired a new line beyond Swiss. It comes under our jurisdiction, but I have no direct knowledge of that at this time.

My statement with respect to transportation conditions covers Pennsylvania and Ohio generally. It does not cover the entire state of West Virginia,—just the part over which we operate trains beyond Dickinson scales north to Toledo. Dickinson Scales is in West Virginia south of Charleston.

By Mr. Martin:

(465) The New York Central Railroad, as distinguished from the P. & L. E., does not handle to my knowledge any ex-river coal from any point on the Ohio River to any point in northeastern Ohio.

I am familiar with all classes of traffic handled by the New York Central Railroad Company. I do not know whether our company handles any ex-river coal to any point in northeastern Ohio. I know the operations and destinations, but I don't know where it originates, whether it is [fol. 1118] ex-river or rail. We do get a volume of coal from the P. & L. E., but I don't know whether it is ex-river coal or all-rail coal.

(466) Hugo is north of Minerva, possibly 36 or 37 miles.

By Mr. Burgess:

Q. As I understand your testimony, the New York Central Railroad Company does not originate any coal in the Pittsburgh or Connellsville Districts?

A. I don't know whether it originates in any district outside of No. 8. That is the only originating coal we have, the New York Central proper.

By Mr. Burgess:

Q. So far as you know, the New York Central Railroad Company does not originate any coal in the Pittsburgh or Connellsville Districts?

Mr. Day: That is correct, Mr. Burgess, we do not have mines down there at all.

Mr. Burgess: I appreciate that.

(467) We do receive coal from the P. & L. E. Railroad and that coal is turned over to us either at East Youngstown or Struthers. All the coal that we ship from our P. & L. E. railroad is turned over to us at either of those two junctions.

We do not, to my knowledge, receive coal originating in the Pittsburgh and Connellsville Districts from any of our other connections other than the P. & L. E.

By Mr. Gutheim:

(468) The line of the New York Central from Youngstown north to Ashtabula is the main connection between the P. & L. E. and the main east and west bound line of the New York Central. That is the route over which we handle not only the coal that I have referred to north, but over which we move the ex-lake ore going south to the Valleys and the Pittsburgh District. We do not consider it a [fol. 1119] heavy density line. Our main line from Cleveland to Buffalo handles many more tons than this branch line, at least 50 per cent of the time.

There are times when we do have heavy density on our low grade line (we have a high line and a low line), especially when coal and ore are both moving, but just at this time——

(469) There is no comparison, in density, between the line from Youngstown to Ashtabula and our line in eastern Ohio coming up from Minerva. The low grade is a whole lot heavier than the one from Minerva up to Cleveland.

By Mr. Herrold:

The New York Central penetrates into the No. 8 district down to Dillonvale; no further south.

The northern edge of the No. 8 district is approximately

20 miles south of Bergholz. That constitutes our entire operation in the No. 8 district.

(470) We handle coal destined to Cleveland just practically 46 miles to Minerva, and Minerva is located just north of the Middle District a little ways. It moved from Alliance into Cleveland via Brady Lake, Hugo, Marcy, Rockport. It extends through Ravenna. I am not so sure about it extending through Hudson. That is a joint track operated also by the Pennsylvania. It belongs to the Pennsylvania and we have traffic rights over it.

(471) Everything from No. 8 district and the Middle district is taken to Minerva and assembled there.

By Mr. Gutheim:

Q. Mr. Heinisch, is this difference in density on the line between Youngstown and Ashtabula due to the fact that [fol. 1120] during the season of lake navigation you have a much heavier ore movement south than coal movement north than you do during the winter season?

A. We certainly do have more movement in the summer season. Of course there is none now and has not been all year. Under normal conditions of industrial affairs we have a much heavier movement of ore south and coal north in the season of lake navigation than in the rest of the year. That is to Youngstown, not to No. 8.

Redirect examination.

By Mr. Day:

Our low grade line and the high line both lead northwardly from Brookfield to Andover and Carson, and one of them is built primarily to handle tonnage and the other is just a passenger (472) route and handles the merchandise to the towns proper for points between Youngstown and Ashtabula. The low grade has no towns on it at all to amount to anything. Brookfield is possibly 18 miles north of Youngstown.

The N. Y. & G. is operated 50-50 by the New York Central and the Chesapeake & Ohio. It is actually operated at this time by the Chesapeake & Ohio.

[fol. 1121] Testimony Taken at Columbus, Ohio, Dec. 16, 1932

Cross-examination of Roy S. Kern (continued).

By Mr. Gutheim:

(474) I have submitted here a number of exhibits of tonnage moving into Ohio and made up from certain reports called Davis reports. My figures do not go to the other side of June 30, 1932. The Davis figures are available from month to month. The reduced rates from Ohio mines to Ohio destinations started to go into effect August 1.

The data on file in the Davis office shows the tonnage by all individual originating districts and railroads, that is, by individual railroads in each district. (475) It is possible to show anything monthly that I have shown annually.

(The witness was requested by Mr. Gutheim and other counsel to submit a statement showing the tonnage of coal moving to the Cleveland group, Lorain and South Lorain, Canton and East Canton, Massillon, Akron group, Youngstown and the Mahoning Valley, Newcastle and the Shenango Valley, and Mansfield, Ohio, by months for the seven months June to December, inclusive, of each of the years 1929, 1930, 1931, and 1932. It was agreed by Mr. Orcutt that this information would be furnished.)

[fol. 1122] Mr. Ballard: Mr. Examiner, have the carriers rested?

Mr. Orcutt: I cannot say definitely, Mr. Examiner, that we have rested. We have for the time being, but as counsel knows we have some additional exhibits to offer by Mr. Kern, one or two small exhibits that are not ready. With that exception we have rested, and they can be put in in a few moments at any time during the hearing.

Mr. Bronson: I may say this, Mr. Examiner, The Pittsburgh & West Virginia Railroad is also a respondent in the complaint of (486) The Trunk Lines in the Thirteenth Section case and I may have some little evidence on the Ohio [fol. 1123] rate situation to present after I. & S. 3801 and 3833. It will only be two or three questions, so I will bring it in to save time.

Mr. Orcutt: I would like the record to show clearly that in speaking for respondents I speak for respondents in the

Thirteenth Section Case other than The Pittsburgh & Lake Erie, Lorain & West Virginia, and Akron, Canton & Youngstown Railways. They are also respondents. Mr. Bronson has spoken for The Pittsburgh & West Virginia, but Mr. Martin has not for the roads he represents.

Mr. Martin: I did not hear what Mr. Bronson said, but as I understand the arrangements our case will be presented as a unit in the Thirteenth Section in the formal complaint cases and in the I. & S. cases following the affirmative presentation in all of these cases, and probably following the presentation by Mr. Burgess in the Thirteenth Section and other cases.

Mr. Orcutt: Then as the record stands, respondents in the Thirteenth Section case have not rested, have they?

Exam. Trezise: Apparently not.

Mr. Martin: As I understand it, there is a distinction between the petitioning carriers who have gone forward up to date and the other respondents who are in opposition to the petitioning carriers and I imagine that Mr. Ballard's question was directed to the point of whether the petitioning carriers have rested.

Mr. Day: We don't understand that the Commission's order of (487) investigation in making the Wheeling & Lake [fol. 1124] Erie as well as the other railroads in Ohio parties to the Thirteenth Section Investigation draws any distinction between the Wheeling & Lake Erie on the one hand and the other railroads on the other.

Mr. Martin: There is certainly a practical distinction between the petitioning carriers who are urging the investigation and the increase of these rates and the respondents who are taking the opposite position.

Exam. Trezise: I think there is no argument about that. I think your plan there of putting in your evidence as you suggested is probably the logical plan. I don't see any question about that.

Mr. Orcutt: Then, Mr. Examiner, I think I ought to withdraw my statement that respondents have rested. I don't think the record should show that until all respondents are through.

Exam. Trezise: Respondents technically, according to the Commission's denomination of respondents in this case, have not rested.

Mr. Ballard: As I understand it, Mr. Orcutt has rested in the sense he stated a moment ago.

Exam. Trezise: That is the understanding. I think we all understand that, and we may proceed.

[fol. 1125] JAMES D. SISLER was called as a witness and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Ball:

(488) James D. Sisler, residence, Morgantown, West Virginia; occupation, State Geologist of West Virginia, with headquarters at Morgantown, West Virginia.

I was assistant Geologist, Maryland Geological Survey, 1919-1921; field work in the coal-bearing area of Western Maryland; Associate State Geologist, Pennsylvania Topographic and Geologic Survey from 1921 to July 1, 1930, in charge of coal, oil and gas; State Geologist of West Virginia from July 1, 1930 to this date; field work in both anthracite and bituminous fields of Pennsylvania also in the coal fields of Ohio, West Virginia, Kentucky and Tennessee. I have published about 3000 pages of various types of information concerning the occurrence, the physical and chemical character, reserves of coal and mining conditions in the various coal fields of Pennsylvania, Maryland, West Virginia and Ohio. I was engineer in charge of coal losses and mining methods under the United States Coal Commission in 1922 and 1923. I have also been a consulting mining engineer to the United States Bureau of Mines and have held other positions in connection with West Virginia University and Ohio State University. I am a member of quite a number of technical institutes and organizations.

(489) I am familiar with the occurrence, physical and chemical character, mining conditions, and uses pertaining [fol. 1126] to the various coal beds concerned in Pennsylvania, Ohio and Northern West Virginia. I have personally examined mines in all of these areas.

I have a map which I am asked to introduce as an exhibit.

(Complainants' Exhibit No. 90, Witness Sisler; received in evidence.)

(490) The map is a compilation of geological maps of Ohio, Pennsylvania, Maryland and West Virginia. It is plotted on a base published by the United States Geological Survey and is correct to the best of my knowledge and belief.

This map was constructed from a base of the United States Geological Survey, having a scale of eight miles to an inch. The extent of Pittsburgh coal was taken from published maps of the Pennsylvania, Ohio, West Virginia and Maryland geological surveys. The map was reduced and the heat required in printing copy and process of developing and washing prints, some shrinkage and distortion took place. Allowing for this shrinkage and distortion, a scale of thirteen miles to one inch would not be an error of more than three miles in 150 miles in any direction, using the city of Pittsburgh as a center of radii.

The upper enlargement is approximately two times the original scale. The lower enlargement on this exhibit is approximately one and one-half times the original scale. This would mean that the scale of this upper enlargement is [fol. 1127] approximately six and a half miles to the inch, and that of the lower enlargement approximately one and one-half times the original scale, or approximately 8.7 miles per square inch. In addition to the geological data with which I alone am concerned, there has been plotted railroads and outlines of rate tariff districts.

Those rate tariff districts will be explained by a later witness. The part of this map which is dotted represents as accurately (491) as can be shown on this scale map the area underlain by Pittsburgh coal in Ohio, Pennsylvania, Maryland and West Virginia. There is a blank area on the map in West Virginia which is marked by parts of Mason, Roan, Calhoun Doddridge, and Wetzel Counties, and the entire area of Wirt and Ritchie Counties which has not been dotted. This does not mean that this area is not underlain by Pittsburgh coal, too. It means that the Pittsburgh coal in this area is extremely thin and is often times entirely absent.

In calculating the reserve of the Pittsburgh coal in all seven of these counties and parts of counties which I have listed, the West Virginia Geological Survey used two feet as an average thickness of the Pittsburgh coal throughout this area. So, considering the thickness of this bed, it is highly improbable that it will be mined within our generation or the next. So although it does form an actual part of

the area of the Pittsburgh bed, it cannot be considered in anywise a commercial part, but rather only as a reserve of Pittsburgh coal for some future date.

[fol. 1128] The main area of the Pittsburgh bed at its widest point is approximately 104 miles in width. It extends from the western part of Morgan County, Ohio into the eastern part of Monongalia County, West Virginia. This line is approximately east-west in direction and is approximately the Mason-Dixon line and its extension westward, its hypothetical extension westward into Ohio. The north-south length of the Pittsburgh coal area is approximately 200 miles.

(492) The Pittsburgh coal in its northernmost occurrence is in the Iselin field of Indiana County, Pennsylvania. It occurs throughout the entire district from the western part of Indiana County, Pennsylvania southwestward to the hilltop around Charleston, West Virginia. The area of the Pittsburgh coal in this district which I have just explained is practically continuous, but there are small outlying areas which do not belong to the main fields, such as the Meyersdale District in Somerset County, Pennsylvania, the Iselin District—and when I speak of districts I am speaking geologically at the moment—the Iselin districts of Indiana County and small areas in the counties of West Virginia lying southwest of Braxton. Some of these isolated areas have been extremely important coal producing areas. The Georges Creek Basin of Maryland, of course, has been famous for its coal production for many years. Its production from the Pittsburgh bed in this area is practically exhausted.

[fol. 1129] The Pittsburgh coal bed occurs in a very large synclinal basin, which could be compared to a canoe in its shape. It has its greatest depth at Wileyville in Wetzel County, West Virginia, where the coal occurs below tide level to approximately 1380 feet below stream level. From that point the Pittsburgh coal rises in every direction, north, east, south and west to its outcropping.

(493) The Pittsburgh bed has the following original area in square miles: Pennsylvania 2077; West Virginia 2214; Ohio 1410; Maryland 28; total 5729 square miles.

There is no commercial production of the Pittsburgh seam outside of what is shown on this map as the Ohio Number 8, Pittsburgh, Moundsville, Connellsville and Fairmont rate districts, with the exception of a very small production in

some of the outlying districts, such as the Georges Creek of Maryland and the Salisbury and Meyersdale Districts of Pennsylvania.

The Pittsburgh coal has the largest and most widespread occurrence of any other coal bed in the Appalachian District. It is the most consistent in physical and chemical character. The same physical characteristics, with local variations, are present in Ohio, Pennsylvania and West Virginia as in the Pittsburgh bed. The type section of Pittsburgh coal from top to bottom is as follows:

Bottom coal, which usually averages about 1 foot in thickness, is often impure and frequently left in the mine, particu- [fol. 1130] larly when a soft clay bottom is present. Above the bottom coal is a parting of slate or shale. It is lacking in some localities. The brick coal lies above this parting of shale and ranges from a few inches to a few feet in thickness. It mines out in brick shaped blocks.

(494) Above the brick coal is a clay or shale parting which ranges from one-quarter to three-quarter inches in thickness, and above it lies a little section of coal ranging from 2 to 8 inches thick. This is called the bearing-in coal, because in the old days of pick mining the miners used this thin bench to open up the face and bear in on, so they could mine the rest of the coal. This section is bounded on the top by another shale parting which is very similar to the one which lies beneath it.

Then comes the breast coal, which is usually four feet of clean coal and is practically everywhere the best part of the bed. Locally the top few inches of this breast coal is extremely dirty, fine ash and sulphur and is left in the mine.

Above the breast is an over-clay, properly known among the miners as "drawslate." This "drawslate" is present practically in every point in the states I have mentioned. It ranges from a few inches to 18 feet in thickness. Its usual focus is from 6 to 18 inches. It is extremely constant in physical character throughout the entire area of the Pittsburgh coal bed.

Above the "drawslate" occurs 1, 2 or 3 rider coals which do not have commercial quality nor character. Those coals [fol. 1131] are not being mined at any point within the area of the Pittsburgh coal.

In Pennsylvania the Pittsburgh coal thickens from north to south. At Pittsburgh it approaches five feet in thickness and in Greene County near the West Virginia line is nine feet thick. The usual (495) partings, "drawslate" and clay bottom, are present in practically every mine. At no point within the State of Pennsylvania is the Pittsburgh coal so thin or so impure that it cannot be mined commercially.

The breast coal usually ranges from 3 to 5½ feet in thickness. The brick and bottom coal, 2½ to 3½ inches in thickness, the bearing-in bench from 2 to 5 inches in thickness.

The Pittsburgh coal thickens along the Monongahela River into West Virginia and some change takes place in its physical structure. The brick and bottom members run into one bench 4 to 5 feet thick. The breast coal has one or more feet of bone coal. The top is generally used for roof supports for the over-clay, so that only about ⅔ of the 3 to 3½ feet of breast coal is suitable for shipment. The bearing-in bench is present and is 7 to 8 inches wide.

The Pittsburgh coal thins westward from Pittsburgh into the Panhandle area of West Virginia, which includes Marshall, Ohio and Brooke County and the Ohio No. 8 District. In the Panhandle area of West Virginia the coal averages [fol. 1132] 4 feet and 7 inches in thickness and usually clean coal, with the exception of the two bearing-in benches. The usual "drawslate" or over-slate is present in both the Panhandle area and the Fairmont Districts of West Virginia (496).

The physical character of the Pittsburgh coal in Ohio is more irregular than it is in Pennsylvania or West Virginia. In Belmont County, Ohio its average thickness is 4 feet, 10 inches, maximum, 8 feet, and its minimum 1 foot. In Jefferson and Harrison Counties the coal has an average thickness of 4 feet 5 inches.

Federal Creek field, which includes part of Homer and Marion Counties, geologically speaking again, is a little outlying district in the southwestern part of Morgan County, and includes Ames and Bern in the northwest part of Athens County. The coal occurs in two benches separated by a layer of clay 1 foot thick. The thickness of the bed varies widely, but the upper bench is usually 2 feet 7 inches thick

and the lower one 3 feet 2 inches thick. The usual "draw-slate" roof is present.

The Pittsburgh coal, along its eastern boundary in Pennsylvania, is of the stick variety. Westward and southward it becomes blocky as the percentage of volatile matter increases. The blocky variety stands shipment much better than the stick variety.

Q. Will you describe the general physical and chemical character of the Pittsburgh coal throughout its entire area? [fol. 1133] In Somerset County, Pennsylvania, Alleghany County, Maryland, and Mineral and Grant Counties, West Virginia, the Pittsburgh coal is a low volatile, semi-smokeless coal of high grade, (497) having 18 to 24 percent volatile matter, and 63 to 70 percent fixed carbon. The percentage of volatile matter increases westward and southward. In the Connellsville District the coal is a high grade coking coal, having 25 to 33 percent volatile matter and 55 to 63 percent fixed carbon. Still further west the volatile matter increases slightly, the fixed carbon drops and coal becomes of the gas coal type in the Greensburg Basin and the Allegheny Region north of Pittsburgh. Around Pittsburgh, and west and south of that city, the Pittsburgh coal is a strong seam coal of the blocky variety. The sulphur content of the Pittsburgh coal varies locally from less than 1 percent to 6 percent where the coal is properly cleaned. The moisture content increases westward into Ohio, so that in the Ohio Number 8 District it contains a maximum of 8 percent moisture.

The following analyses are typical of the area in which they occur:

[fol. 1134]

Pennsylvania	Moisture	V. M.	F. C.	Ash	Sulphur
Southern Somerset County	2.7	20.9	70.3	6.1	0.80
Connellsville Basin	2.4	29.9	60.5	7.2	1.00
Northern Washington County	2.8	35.2	55.3	6.7	1.01
Ohio Number 8 District	4.13	36.15	50.78	8.81	3.77
West Virginia					
Ohio County (Panhandle Area)	2.22	36.38	54.52	6.90	1.98
Marion County (Fairmont District)	1.66	36.63	55.62	6.41	1.91

(498) This is to show that the chemical character of the Pittsburgh coal in all of these areas is practically identical, with the exception that the volatile matter increases westward and southward from the Meyersdale District in

Pennsylvania and the Pittsburgh District, also of Pennsylvania.

The important uses of Pittsburgh coal are: (1) General steam generation—hand, stoker and pulverized firing; (2) Domestic or household fuel; (3) Gas manufacture—retort and producer gas; (4) By-product coke oven fuel; (5) Kiln fuel—cement, lime, brick and tile manufacture; (6) Indus- [fol. 1135] trial furnace heating—malleable and refining furnaces; (7) Export; (8) Locomotive fuel—hand and stoker firing; (9) Bunker fuel.

[fol. 1136] The uses of Pittsburgh coal common to its entire area are power plant use, locomotive fuel, domestic or household; general steam generating purposes. These uses are common to all other coals mined in northern West Virginia, Pennsylvania, and Ohio.

(499) Pittsburgh coal from the Uniontown-Connellsville basin of Pennsylvania is particularly adapted to the manufacture of metallurgical coke.

The principal commercial coal seam in the Fairmont, West Virginia District is the Pittsburgh. Other coals being mined in the Fairmont District are the Redstone coal, which lies between 20 and 40 feet above the Pittsburgh, is being mined at a few points in Monongalia County on Scotts Run. The Sewickley coal, which lies between 55 and 100 feet above the Pittsburgh, is also being mined commercially on Scotts Run in Monongalia County. The present commercial importance of these two beds in West Virginia is limited to Scotts Run in Monongalia County, West Virginia and to a few scattered points in Marion and Harrison Counties.

(500) Scotts Run is just west of Morgantown, West Virginia and right on the Pennsylvania-West Virginia boundary. It is shown on the map as lying close to the railroad marked "W.M.", close to the eastern boundary of the Fairmont rate district, shown in blue in Monongalia County. [fol. 1137] There are no towns here. I can't locate it any closer than that, there are no towns on the map.

The Pittsburgh seam, because it is the thickest and most persistent coal bed, having an excellent chemical character, is the most important source in the Fairmont District, and that production from other beds except Scotts Run is negligible.

The most important commercial coal in what I have termed the Panhandle area of West Virginia is the Pittsburgh, because that is the thickest coal bed that occurs in that area and it has the best chemical character. There are no other coals mined commercially in the Panhandle area of West Virginia.

The principal producing coal bed in the Connellsville region of Pennsylvania is the Pittsburgh, (501) because it is the thickest bed which is present in the Connellsville Basin and is particularly adapted to the manufacture of coke in beehive ovens. It is particularly adapted for this use because of its low sulphur content.

The Pittsburgh coal in the Connellsville Region is rapidly being exhausted. The Sewickley coal, which lies some hundred feet above it, is being mined for local use in the vicinity of Uniontown. The Upper Freeport, lying 600 feet below the Pittsburgh, is mined for local use along the Chestnut Ridge east of Uniontown. The Sewickley and Freeport coals are not important commercially in this area. [fol. 1138] In the area shown on Exhibit 90 as the Pittsburgh freight rate district, the Pittsburgh bed is the most important commercially. It is the most persistent in thickness and occurs in the largest area in this district. It has excellent chemical quality and is a fine steam coal. There are no other beds mined commercially in the Pittsburgh freight rate district.

"Q. What are the beds producing commercial coal in the Freeport rate district?

A. The Upper Freeport coal, lying north of Pittsburgh, along the Alleghény is gradually becoming a very important commercial coal. Its chemical character is excellent, but its area is much smaller than that of the Pittsburgh."

The most important commercial coal in the Ohio Number 8 District, as shown on the map, is the Pittsburgh, because it is the thickest bed and has the best chemical character, and can be reached more readily by surface and shaft mines than any other bed in the district. Other beds being mined commercially are the Redstone and Sewickley coals which lie above the Pittsburgh and are mined for local use, although they have no commercial importance as shipping coals. There is one mine, a deep shaft mine which is mining, either the Middle Kittanning or lower Freeport.

The correlation of the coal bed has not yet been determined.

The Pittsburgh coal is not mined commercially in any district in Ohio other than that shown on this map as Ohio Number 8, except in the extreme eastern portion of the area which is shown on the map as the Cambridge rate district.

[fol. 1139] Q. Geologically, what is the relation between the Pittsburgh area, (503) Moundsville, Fairmont and Connellsville and Ohio Number 8 Districts as shown on the map?

A. All of these districts are mining the Pittsburgh coal, which lies in one continuous sheet from Pittsburgh southwest to Morgan County, Ohio, and from Pittsburgh south to Braxton County, West Virginia. The Pittsburgh coal bed decreases somewhat in thickness southwest of Pittsburgh, but its physical and chemical character remains the same with the exception that the moisture content increases southwest of Pittsburgh into the Ohio Number 8 District. Geologically all of these rate districts are practically identical, because the same coal bed with approximately the same chemical character is the principal coal being mined.

I wish now to file as my Exhibit No. 91 a mimeographed sheet of proved minable coal areas in Ohio.

(Complainants' Exhibit No. 91, Witness Sisler, received in evidence.)

The information contained on Exhibit No. 91 was taken from bulletin No. 34, of the Ohio Geological Survey, issued in 1930, and contained on page 338. This exhibit shows that the Pittsburgh coal had the largest original proved mining area in the State of Ohio. This exhibit shows that there were originally 415 square miles of Pittsburgh coal in Belmont County, 110 square (504) miles in Harrison County, 110 square miles in Jefferson County, 112 in Meigs [fol. 1140] and smaller, much smaller acreages in other counties. The total minable area of the Pittsburgh coal in Ohio is 816 square miles. The total proved area of coal in all beds in Ohio is 2,390 square miles, showing that the Pittsburgh original proved mining area was a little less than half of the entire original proved mining area.

This exhibit takes all coal in consideration that has a thickness of 2.7 feet and includes coals of all depths.

I wish to file as Exhibit No. 92, containing 15 parts, a statement of the production of coal by counties in Ohio, Pennsylvania and West Virginia.

(Complainants' Exhibit No. 92, Witness Sisler, received in evidence.)

Parts 1 to 8 concern Ohio. These records were taken from Ohio State University College of Engineering, Bulletin No. 12, beginning on page 340. These records show that the Pittsburgh coal bed has been one of the most important producing beds in the State of Ohio, and that all of this tonnage has come from the area shown on Exhibit No. 90 as from the Ohio Number 8 freight rate district, which includes Belmont and part of Jefferson and Harrison Counties.

(505) It is not possible from these records to obtain exactly the production from the Pittsburgh seam. The State of Ohio has not separated their tonnage as being derived from separate beds.

[fol. 1141] The tonnage produced in what is shown on this map as Ohio No. 8 which comes from the Pittsburgh seam, amounts, in my opinion, to a little less than 100 percent. There has been very little coal mined and shipped from the Ohio Number 8 freight rate district which has not come from the Pittsburgh coal bed.

Continuing to explain my Exhibit No. 92, Part 9 shows the production of coal in counties in Pennsylvania in which the Pittsburgh and Connellsville freight rates districts are situated, for the years 1897 to 1931 inclusive. The authority is the United States Geological Survey, Mineral Resources, from 1897 to 1928; from 1929 to 1931 inclusive, the authority is the Pennsylvania Department of Mines.

Continuing, part 10 of Exhibit No. 92 shows the percentage of coal production from the Pittsburgh and other seams in the five counties of which the tonnage is shown on Part 9. The total production of Pittsburgh coal in all of these mines from 1927 to 1931, the past five years, was 338,451,441 tons. The percentage of Allegheny County, Pittsburgh, 57.86 percent. This percentage is low, (506) because in the last few years the Freeport coal being mined in the Freeport rate district has been shipping more and more tonnage each year. The percentage of Pittsburgh coal mined in Fayette County, Pennsylvania is 96.50; Greene County, 90.1; in

Washington County, 100 percent; Westmoreland County, 88.86, and the average for all five counties is 87.98. There [fol. 1142] is no other production in Allegheny County except from the Pittsburgh seam and the Freeport seam.

Part 11 of Exhibit No. 92 shows the production of coal from the Fairmont District in West Virginia, 1888 to 1931 by counties. The source is the annual reports of the West Virginia Department of Mines at Charleston. No records by counties were available previous to 1888. The four counties, Harrision, Marion, Monongalia and Taylor, comprise the Fairmont District. The total production of all coal from this district from 1888 to 1931 was 469,693,460 tons.

Part 12 of Exhibit 92 shows the percentage of coal production, Pittsburgh and other seams, 1925, to 1931, seven years, in the Fairmont District, namely, Harrison, Marion, Monongalia and Taylor Counties, West Virginia. The percentage of production of the Pittsburgh coal in Harrison County was 99.54; Marion County, 91.51; Monongalia County, 51.11, and Taylor County, 99.22. (507) The seven-year average of all counties in the Fairmont rate district was 80.50.

Part 13 of Exhibit 92 shows the coal production in Brooke, Marshall and Ohio Counties, West Virginia, 1888 to 1931 inclusive, and totals for these counties, with the totals combined with those for Harrison, Marion, Monongalia and Taylor Counties. These figures are taken from the annual reports of the West Virginia Department of Mines. Again no records by counties were available before 1888. Production from these three counties, Brooke, [fol. 1143] Marshall and Ohio from 1888 to 1931 inclusive was 102,276,925 tons. The total production of all seven counties, including those of the Fairmont District, namely, Harrison, Marion, Monongalia and Taylor, Brooke, Marshall and Ohio Counties, was 571,970,385.

There is no production of the Pittsburgh coal in Hancock County, West Virginia, at the present time.

Part 14 of Exhibit No. 92 shows the percentage of coal production, Pittsburgh and other seams, 1925 to 1931, seven years, in Brooke, Marshall and Ohio Counties, West Virginia. The percentage in Brooke was 100 percent Pittsburgh; Marshall 99.93; Ohio County 99.99. The average for all three counties was 99.98. The total combined for all seven counties of West Virginia producing commercial

Pittsburgh coal was 84.45. The percentage produced from other beds was 15.55.

(508) Part 15, Exhibit No. 92, shows Pittsburgh coal mined in the seven West Virginia counties, based on percentage of production of Pittsburgh coal for the years 1925 to 1931, with the amount available at the end of 1931. The Pittsburgh coal available at the end of 1931 in Harrison County was 1,512,527,381; Marion 1,651,161,058; Monongalia 1,457,712,378; Taylor 81,598,795. The total of all four counties was 4,702,999,612.

In Brooke County, 97,392,180 tons; Marshall County, 2,065,027,862; Ohio County, 316,245,286, with a total for these three counties of 2,478,665,328 and a total for all seven [fol. 1144] counties of 7,181,664,940.

These tonnages were taken from the report of the West Virginia Department of mines and the West Virginia Geological Survey.

I now wish to file my exhibit No. 93, consisting of seven parts and showing the estimated original tonnage in coal beds in Ohio, West Virgina and Pennsylvania.

(Complainants' Exhibit No. 93, Witness Sisler, received in evidence.)

Part 1 shows the estimated original tonnage in Ohio coal beds. That from the Pittsburgh bed was 4,168,704,000. The total for the entire state is 10,399,296,000. A little less than half of the original coal tonnage in Ohio was in the Pittsburgh bed.

(509) Part 2 is simply a continuation of part 1, giving the estimated tonnage, original tonnage in coal beds which lie below the Pittsburgh.

Part 3 shows the original deposits of coal in five Pennsylvania counties, Allegheny, Fayette, Green, Washington and West Moreland. This exhibit shows that of the total tonnage of 34,796,296,000 tons, 14,216,428,000 were originally present in the Pittsburgh bed—against a little less than half of the original coal tonnage in these five counties in Pennsylvania was in the Pittsburgh.

Part 4 shows the quantity of coal mined out and lost to the end of 1926 in five Pennsylvania counties. The total for these five counties was, during that period to the end [fol. 1145] of 1926, 3,687,038,000 tons. From the Pittsburgh seam it was 3,519,200,000 tons. In other words, up until

1926, practically all of the tonnage of coal mined in these five counties was from the Pittsburgh.

Part 5 shows the recoverable coal in these five counties to the end of 1926. The total recoverable from these five counties, 19,158,779,000; from the Pittsburgh, 8,090,637,000, or a little less than half of the original of the recoverable coal was contained in the Pittsburgh bed. The total recoverable Pittsburgh coal still present in these five counties in Pennsylvania at the end of 1931 was 7,752,185,559. In other words, the Pittsburgh (510) coal in these five counties of Pennsylvania has just been about half worked out.

Part 6 of Exhibit 93 shows the original coal tonnage in the Fairmont rate district of West Virgina. This information was taken from the county reports of the West Virginia Geological Survey. The total original tonnage in the Fairmont District was 11,566,124,117 tons, of which 5,108,649,252 tons was contained in the Pittsburgh bed.

Part 7 of Exhibit No. 93 shows the original tonnage in Brooke, Marshall and Ohio Counties, West Virginia, with totals for these three counties, and combined total for Monongalia, Marion, Taylor, Harrison, Brooke, Marshall and Ohio Counties. Again the information was taken from the county reports of the West Virginia Geological Survey. [fol. 1146] In these seven counties the total of original coal tonnage was 17,284,981,491, of which 7,689,565,476 tons was present in the Pittsburgh coal.

Cross-examination.

By Mr. Orcutt:

My Exhibit No. 90 is a geological exhibit as to rate districts only. I do not show all of the coal fields. For instance, the Pittsburgh District is limited on the north there at Kiskiminetas Junction. (511) There is coal available and there are mines and active producers there on northward in Pennsylvania. East of the West Moreland District, that is likewise true.

The shaded portion of the exhibit indicates only the area of the Pittsburgh coal bed and does not include areas of beds which lie above and below it.

(512) The Pomeroy District shown in green on the map follows the line of the New York Central Railroad. The development of that vein followed the railroad.

In the Jackson District, one spur of the Jackson District, the shaded portion goes south to Vinton, and on the left it goes still further south. Between those two forks there is no shaded portion shown. That indicates there is no commercial mining being done in that territory at the present time. It does not mean there is no coal there, because it is there. It is undeveloped coal. The shaded portions of the map by no means indicate all the coal being mined, involved in this proceeding. As a matter of fact, the shaded [fol. 1147] portions show a great undeveloped area. That is particularly true of Ohio.

The map shows the entire county of Meigs shaded and all of Athens County. I should say that not more than one-tenth of the area shaded there is being mined (513).

By Mr. Reed:

Q. Mr. Sisler, your Exhibt 91, I would like to inquire if the area of coal represented in this exhibit is unmined at the present time for the original area?

A. That is the original area.

On Exhibit 93, I show the unmined coal in Pittsburgh, Western Pennsylvania and West Virginia coal districts. I do not show that for the Ohio Districts because that information is not available from any source from which you may get it.

By Mr. Burgess:

The Freeport seam coal differs chemically, to some extent, from the Pittsburgh seam coal.

By Mr. Ballard:

The ash content of the Pittsburgh coal from Number 8 District I gave as 8.81. The source of that figure, and also the sulphur content, fixed carbon, volatile matter and the moisture, are analyses done by Lord & Summermyer, of the Ohio Geological Survey.

(514) Some of them published in the Geological Survey of Ohio, Bulletin 34, by Bownocker & Dean, 1930.

[fol. 1148] My exhibit 93, part 5, shows at the bottom of that sheet the recoverable Pittsburgh coal in five Pennsylvania counties at the end of 1931. None of the Ohio reports contain corresponding information. It has never been

compiled. There is no information contained in these exhibits from which it could be computed.

The Pittsburgh coal from the Ohio Number 8 District is primarily not a coking coal. It does not cake like the coal from the Connellsville District in Pennsylvania. In order to use Pittsburgh coal successfully from the Ohio Number 8 field it may be possible to mix it with other coals and then it would coke satisfactorily. To my knowledge that is not being done commercially now.

(515) The utility of the Pittsburgh vein coal in Ohio number 8 District is limited to steam and domestic purposes.

My attention is called to the fact that in connection with Exhibit 91, I stated that the total amount of proved Pittsburgh and Pomeroy minable coal in Ohio is a little less than half of the total area of proved coal in all beds in that state. As a matter of fact it is just about one-third.

By Mr. Gutheim:

(516) Q. I would like to ask Mr. Sisler whether these [fol. 1149] differences of moisture percentage, of sulphur percentage, of volatile matter, fixed carbon are of particular materiality in the marketing of the coal as distinguished from the mining.

A. In these days when customers are asking for cleaned sized coal with the highest heating value there is a difference. The moisture content of the coal, for instance, if it is high it means a certain amount of heat must be used to dry off that (517) moisture before heat can be realized. In other words, moisture decreases the heating value of the coal.

Q. Then despite the fact that all of this Pittsburgh seam coal may be generally acceptable for raising steam, certain of this Pittsburgh seam coal is acceptable in the market for certain purposes in addition, and other of the Pittsburgh seam coal is not acceptable for those purposes?

A. Yes, sir.

When I have referred in my testimony to "Pittsburgh coal" I mean coal which is produced from the Pittsburgh bed or Pittsburgh seam.

In my answer to the question of Mr. Gutheim I did not intend to convey the impression that the Pittsburgh seam

coals mined in the Pittsburgh and Ohio Number 8 and West Virginia District were not available for steam purposes, some of them.

[fol. 1150] J. F. GRAVES was called as a witness and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Bull:

(518) J. F. Graves, Traffic Manager for Receivers of the Consolidation Coal Company, 15 Broad St., New York City.

For two years I was in the traffic department of the Western Maryland Railroad, one year with the Baltimore and Ohio Railroad, and for the last eighteen years in the traffic department of the Consolidation Coal Company, the last six of which was as Traffic Manager.

Q. Will you please refer to Exhibit No. 90, introduced by Witness Sisler, and make your own explanation of the freight rate districts shown thereon?

A. This is a copy of a map introduced as Exhibit 338 in Lake Cargo Cases 1931, Dockets 23240 and 23241, reported in 181 I. C. C. A few changes have been made thereon which I will explain. The Middle and Massillon Districts have been added to the map; the other origin districts are the same as the origin districts of similar name in this case, except the Pittsburgh and Connellsville Districts shown respectively in pink and yellow. In the upper enlargement that portion of the Pittsburgh District lying (519) south of Brownsville Junction, Pennsylvania, tributary to the two lines of the Monongahela Railroad and the Pennsylvania Railroad to Millsboro, Pennsylvania, should [fol. 1151] be in the Connellsville district, which is the district shown in yellow. Referring now to the main portion of the map, nearly all the mines on the Pennsylvania Railroad in that section of the Pittsburgh District shown in pink in the northern part of the Panhandle of West Virginia take rates lower than the Pittsburgh District rates.

The points of destination carrying a double circle, or encircled dot, are representative of the destination territory

involved in this case. The Sandusky-Galion line, or the eastern boundary of affected territory is indicated by the heavy broken line.

Q. You may explain, Mr. Graves, how you got the outline of the rate districts that are shown there?

A. We took the most distant point in the various directions from which the rates applied to this territory and then drew lines from point to point, following more or less the contour of the railroads until we entirely encircled a rate district.

Q. What do you mean by the term "Fairmont District" as you use it?

A. Those districts in northern West Virginia designated in Baltimore & Ohio Railroad tariffs as origin districts on their line, Fairmont No. 1, Opekiska, Monongah, Short Line and Clarksburg (520) and Fairmont No. 2 on the Monongahela Railroad; in Pennsylvania Railroad tariffs as [fol. 1152] Group 3 on the Monongahela; in Pittsburgh and Lake Erie Railroad tariffs as Group C on the Monongahela Railroad and in Western Maryland Railroad tariffs as Fairmont.

I desire to introduce Exhibit No. 94, consisting of six pages and being a chronological statement of rates on bituminous coal, carloads, from Ohio No. 8, Pittsburgh, Connellsville and Fairmont Districts and differences in rates Fairmont over Ohio No. 8 District to destinations in northeastern Ohio. The authorities for the rates shown on this exhibit are also the authorities for rates shown on subsequent exhibits.

(Complainant's Exhibit 94, Witness Graves, received in evidence.)

My next Exhibit No. 95, consisting of five pages, is a composite statement of average distances via all tariff routes, rates, and revenue per ton mile on bituminous coal, carloads, from all tariff origins in Ohio No. 8, Freeport, Pittsburgh, Connellsville, and Fairmont Districts to representative destinations in northeastern Ohio. With regard to this exhibit I wish to explain we have not computed any of the distances ourselves, having used the distances shown in (521) Carriers' Exhibit No. 38, except those applying from the Fairmont District as we have described it, and as to that district it is a complete analysis of carriers' tariffs.

(Complainant's Exhibit 95, Witness Graves, received in evidence.)

[fol. 1153] Witness Kern, for the carriers, made certain corrections in Exhibit 38 which were as follows and which should be made in this exhibit: To Cleveland, Ohio, total number of origins from the Pittsburgh District, 1203 instead of 1209; total miles 207,657.9; average distance, 172.6; total origins, 12 instead of 18, total miles 1941.9; average distance 159.6; revenue per ton per mile, 9.71 instead of 9.18.

From the Pittsburgh District to Lorain, total number of origins 2,673 instead of 2,679; total miles 530,162.6; number of origins, 12 instead of 18; total miles 1,939.2; average distance, 161.6; revenue per ton mile 9.59 instead of 9.07.

To Huron, number of origins, 213 instead of 219, total miles 45,115.3; average distance, 211.8; number of origins, 12 instead of 18. Total miles 2071.2; average distance 172.6; revenue per ton per mile 9.56 instead of 9.07.

In calculating the distance from the Fairmont District we used the method which the carriers explained to us as the method used by them. Witness Kern has already described this in detail.

(522) In the blank spaces on the exhibit 38, I. C. C. Docket 25566, should be filled in.

[fol. 1154] My next exhibit, No. 96, is a condensed statement of average distances, rates, revenue per ton mile from various origin districts to destinations in northeastern Ohio. The same corrections which I made in Exhibit No. 95 should be made in this exhibit also.

(Complainant's Exhibit No. 96, Witness Graves, received in evidence.)

(523) In my Exhibit No. 95 I stated that all of the data with the exception of that applying to Fairmont, was taken from carriers' exhibit No. 38 in Docket 25566. I should also include Exhibit No. 33, which applies to the Ohio districts.

Cross-examination.

By Mr. Martin:

When I stated that I followed the method of computing distances employed by the carriers, I referred to the

method of all tariff routes from all tariff origins. I did not include the active mines in that group.

By Mr. Gutheim:

The map, Exhibit No. 90, shows the line of the Pennsylvania Railroad running from Kiskiminetas Junction up toward Butler and shown in the Freeport District. I am not in position to say whether that is correct. I did not personally prepare the map. It was prepared by some people in the office and I assume it is correct. Mr. Gutheim states that his information (524) is that that particular line is [fol. 1155] not in the Freeport District. That is satisfactory to me. I am just going by the map as it was shown.

[fol. 1156] J. N. SNIDER was called as a witness and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Bull:

(524) J. Noble Snider, New York City, General Manager of Sales for Receivers of the Consolidation Coal Company. Prior to the receivership and since June 1929 I was vice-president in charge of sales of the Consolidation Coal Company.

In 1919 and 1920 I covered New York State territory selling anthracite and bituminous coal for Madeira Hill Company. From December 1923 until May 1929 I was vice-president in charge of sales of the Rochester & Pittsburgh Coal and Iron Company. In June 1929 I joined the staff of the Consolidation Coal Company (525) as General Manager of Sales, and shortly thereafter became vice-president in charge of sales. For about 16 years I was identified with the Coal Traffic Department of the New York Central Railroad in New York City and served as Coal Freight Agent of that railroad just prior to the World War; as acting Coal Traffic Manager during the war and as Coal Traffic Manager from 1921 until December 1923. During part of that time in 1922 I was loaned by the railroads to the Emergency Fuel Administration in Washington under Mr. Spencer. The Consolidation Coal Company

is a large and important producer of coal in the Fairmont region. Its holdings in that region comprise approximately [fol. 1157] 80,000 acres of mineral land owned outright and another 24,000 acres leased. At one time we had approximately 75 mines in operation in this field. Many of those have since been worked out and abandoned. Others have been closed down for reasons of economy and to await the return of better times. We are now operating 8 mines in this region which have a total actual daily productive capacity of approximately 12,000 tons, or an estimated annual capacity of about 3,600,000 tons, which could very readily be substantially increased if sufficient business was available. These mines are developed and produce only Pittsburgh seam coal.

(526) Our company's production in the Fairmont District is a very important part of our total production. In 1929 our Fairmont mines produced 4,075,758 tons, which was 35.7 per cent of our total production from all of our mining operations. In 1930 our Fairmont production was 3,460,831 net tons, equivalent to 33.8 per cent; in 1931, 3,981,451 net tons, equivalent to 40.4 per cent; and for the first ten months of 1932, 2,076,310 net tons, equivalent to 38.8 per cent of our total production.

Fairmont has no home market except for a comparatively few industries in and around the city of Fairmont, West Va., and — nearby points the consumption of coal is comparatively small, and except for the various railroads serv- [fol. 1158] ing the Fairmont field who draw a large part of their engine supply requirements from that field. In this latter respect, however, the situation is not peculiar to the Fairmont District. Geographically, and from the standpoint of the usability of the coal, there are potential markets for the Fairmont coal generally in New England and the Atlantic states, in Canada, generally in the Province of Ontario, and in northeastern Ohio and in the lake cargo coal trade. In reaching these various markets we have to overcome a freight rate differential.

(527) Our company encounters very severe competition from other producers of coal in our endeavors to sell in the northeastern Ohio territory, and this is particularly true in the case of operators producing Pittsburgh seam coal who are located in the Pittsburgh District, Ohio No. 8

and, to some extent, Connellsville, all of whom enjoy freight rates differentially lower than apply from Fairmont.

This consuming territory in northeastern Ohio is a very important market for the sale of our Fairmont coal. I think the carriers have already introduced exhibits showing the tonnage moving from various rate districts to the consuming territory in northeastern Ohio. Approximately 10 per cent of our commercial shipments from the Fairmont [fol. 1159] District move into this same territory.

I am familiar in a general way with the freight rate structure applying to northeastern Ohio from our mines, and from those of our competitors who are located in Pittsburgh and Ohio No. 8.

(528) Fairmont was not on a rate parity with these districts prior to August 1, 1932. To Cleveland and Cleveland rate points the rates from our Fairmont mines prior to August 1, 1932, were 15 cents per net ton higher than those applying from the Pittsburgh District in Pennsylvania and 25 cents per net ton higher than Ohio No. 8. The Fairmont rates are now 54 cents higher than on coal from Ohio No. 8 Districts, and 44 cents higher than on coal from mines on the Pittsburgh & West Virginia in the Pittsburgh District off the Wheeling & Lake Erie Railway. They are still 15 cents higher than apply from other Pittsburgh District mines. To other points of destination in northeastern Ohio where reductions by Ohio lines were less than 29 cents, our normal differences have been increased by the measure of the decrease actually made in the Ohio rates.

The sales that we have been able to make in northeastern Ohio have been in spite of these rate handicaps. Starting with a good grade of coal in the properties we own, it has been for many years a fundamental policy and practice [fol. 1160] of our company to mine our seams of coal in the manner best (529) adapted to preserve their high inherent value and closely guard their preparation at the working face, to supplement this with still further cleaning at the tipple, to carefully screen into the various sizes needed by our trade, and, in so far as is humanly possible, to constantly maintain our high standards of quality and preparation to the end that each and every railroad car, when loaded for shipment to our customer, will be as much like

the one preceding it as it can possibly be. This high standard of quality, this uniformity of preparation and sizing has been a material aid to our customers in fixing the measure of value of our coal in comparison with these competing coals. The value of any coal to a consumer is determined by the value of return he secured from it per dollar of cost. This return may be measured by yield of gas, proportions of by-products, cost per thousand pounds of steam or of any other special purpose for which the coal is being used. Superior proportions of the desired elements, or more advantageous performance under the boiler can be measured in terms of dollar value. These values, added to the delivered cost of competing coal, fixes a maximum which the buyer can be expected to pay for our coals f. o. b. his plant. Deducting therefrom the freight rate applicable from our mines we have whatever is left [fol. 1161] to compensate us for producing and selling the coal. It is my duty to determine whether that return is adequate, whether it will cover out-of-pocket costs, whether there are collateral (530) advantages to be secured at present or in the future from booking the business, and whether there are sufficient incomes from miscellaneous sources enhanced by this sale which will compensate us somewhat for the smallness of the return secured.

In other markets where Fairmont differential over Ohio No. 8 has been as great as 50 cents per ton, we have been able to compete for business only to a very small extent. To illustrate, I would like to offer Exhibit No. 97, which shows by calendar years of 1929, 1930, 1931 and the first nine months of 1932 the movement of Fairmont coal to consumers located in the various points listed, which are Lima, Sandusky, Toledo, Ohio, Grand Rapids, Kalamazoo and Lansing, Mich., and Fort Wayne, Indiana, to which points the rate from Fairmont origins is 50 cents per ton higher than the rates from the Ohio No. 8 field.

(Complainants' Exhibit No. 97, Witness Snider, received in evidence.)

This statement also shows tonnages of Ohio No. 8 coal shipped to these same destinations and evidences very clear the inability of Fairmont to do much business under such heavy rate handicap. Being unable, as shown in this Exhibit No. 97, to sell much coal where our rate handicap

[fol. 1162] was 50 cents, it is unlikely that we will be any more successful in selling in the Cleveland rate territory on a differential (531) as great as 50 cents.

To anyone familiar with the liquidation of coal prices which has taken place throughout several recent years and is still going on and who is aware of the vicious fight for markets which is taking place within the bituminous coal industry and of the keen and ofttimes unscrupulous competition which prevails among coal operators having access to these markets, it must be instantly apparent that any increase in the already existing differential handicap of any one district as compared with another contiguous one producing substantially the same type of coal adds materially to an already heavy competitive burden.

Where the differential handicap was as much as 25 cents a ton, as it was in the case of Fairmont and Cleveland rate points, for example, and when the increase in such differential is as much as 29 cents, equivalent to 116 per cent, as in this present case, it must be even more readily apparent that for us to overcome the competitive burden now placed upon our Fairmont coal is a practical impossibility.

The Consolidation Coal Company's business to northeastern Ohio has been affected by the reduction in the rates from Ohio No. 8 to northeastern Ohio. Too short a time, however, has elapsed since our enlarged differential handi- [fol. 1163] cap became effective for any figures of record to show the full detrimental effect of the change on our business. Early in August it became apparent to all concerned (532) that if the reduced rates from the Ohio mines remained in effect without remedial action being taken by other railroads competitively affected, a serious dislocation in the normal distribution of the business would follow. It was believed unlikely, in view of the need of all carriers for revenue, that those adversely affected would sit by and see their share in this business diverted elsewhere without doing something to retain it.

Generally speaking, the consumers of the coal or customers did not look with favor or satisfaction upon such possible dislocation. Interference with their normal channel of supply in such fashion caused them some uneasiness. Relationships of long standing were in jeopardy. Coal which they had used by choice and in preference to this normally available on lower freight rates and a service which

was so continuously satisfactory was likely to be denied them. They translated this state of mind into pressure upon us to meet the issue in some fashion.

We believed our originating carriers, in their own protection, as well as in ours, would want to meet the issue and maintain their competitive position, so we acquainted [fol. 1164] them with the devastating effect the increased differentials would eventually have upon our business and urged prompt action for relief. Several weeks of consultation among the carriers themselves and of conferences by them with their shippers (533) followed, during which time all of us, shippers, railroads and consumers, were encouraged to hope for a speedy adjustment. While this was going on and there were still hopes, many of our customers were loathe to leave us. They were in no haste to be off with the old and on with the new. They preferred to stand by us and stay with us as long as they could. We were concerned to have them do so and wherever possible made further sacrifices in order to in part at least overcome the arbitrary and unjustifiable increase in our competitive burden. For these reasons we continued to get throughout September and October substantially the same volume of normal, current business as we had been previously getting.

In addition to that, there was in September a slight forward movement in general business which resulted in increased consumption of coal. We enjoyed some little benefit from that. In October the forward impulse in general business still obtained and there also was a material increase in the buying of coal for household and other heating purposes. Some of the steel companies came into [fol. 1165] the market for additional supplies of by-product coal. Many of our retail dealers, customers had served their household trade this year earlier with our coal and were loathe to change just at this time. Consequently we still secured a fair share of this type of business, although on most of it we had to make some further sacrifice in price to help overcome the added competitive burden created by the reduced rates (534).

Our sales obligation naturally divided into two parts, into two general and fundamental classifications: Contract and spot. Contract sales are those which are covered by agreements, written or otherwise implied, under which our

customers obligate themselves to take certain tonnages from us over an agreed period of time in substantially equal monthly proportions on an agreed price and subject to such other terms and conditions as are mutually agreed upon at the time the sale is negotiated. Spot sales are sales made currently day by day for shipment of specific tonnages at a fixed price within limited periods of from 30 to 60 days.

Basing our estimate on the original differential basis, we figured early in August our reasonable expectancy of contract business still to be secured, plus contract business on our books and of spot sales to be made during the period [fol. 1166] from August 1, 1932 to March 31, 1933, at a minimum of approximately 200,000 tons, or roughly from 20,000 to 30,000 tons a month for the eight months' period.

Despite all we have been able to do in the interim, all the sacrifices we have been able to make, and notwithstanding the helpful attitude of some of our customers, as already commented upon, we have lost approximately 66,000 tons of this business up to date, to the first of December. These losses will pyramid and others will be added to them month after month (535) if we are not soon relieved of our increased competitive handicap.

[fol. 1167] Cross-examination.

By Mr. Burgess:

We ship some coal to Cleveland, very little to Canton and Massillon, and virtually none to Youngstown. I do not think we ship any to the iron and steel industries in the Wheeling-Steubenville District.

The difference between the Fairmont and Ohio No. 8 rates to points shown on Exhibit 97 remained at 50 cents during the entire period covered by the exhibit, I think.

By Mr. Herrold:

And I also think that differential still prevails.

Cleveland is our principal market in northeastern Ohio (536). I have not set out the tonnage covering our movement to Cleveland. Some of our coal is by-product coal.

I would say that our shipments into northeastern Ohio predominate in steam and domestic, and most of that goes to Cleveland and Cleveland rate points.

I don't know that there is any principal market for Fairmont coal. We do not ship any to Pittsburgh. We ship it eastward to some extent, the Atlantic Seaboard. (537) I don't think we ship more easterly than we do into Ohio.

Cleveland and Cleveland rate points are the principal markets of our company in Ohio. We have some business in Akron, which we do not consider in the Cleveland rate group.

We market more steam and domestic coal than by-product coal. Offhand I should say the percentage is about 60-40. [fol. 1168] Sixty steam and domestic and forty by-product. Gas coal is included in our term of by-product coal.

(538) In the Cleveland market our competition is Pittsburgh and Ohio No. 8 coal. Our coal is also competitive with Cambridge and Hocking and other Ohio coals.

By Mr. Ballard:

Q. Mr. Snider, you gave the volume of coal produced at your Fairmont mines and the percentage that represented of your total production for the last four years, indicating that your 1931 proportion was very much higher than your 1929 or 1930, and that your 1932 proportion was running at about the same rate as 1931. What accounts for that?

A. That is the Fairmont production in relation to the total company's production.

Q. In relation to the total Consolidation Coal production, is what I understand it to be?

A. Yes, Well, that might be due to several factors, Mr. Ballard. Possibly one of the principal factors has been the investment which our company has in the Fairmont properties is very extensive, the productive capacity was considerable, and after I joined the organization of the Consolidation Coal Company (539) we endeavored to find new markets and additional consumption in the present markets for Fairmont coal in order to build up the production of those operations which were such a heavy part of the total burden of the company.

[fol. 1169] Q. And the extent to which you succeeded is measured by those figures?

A. Not exactly, because there are other factors that were involved. This is a percentage figure and would be affected to some degree by the possible shrinkage of production

from some of the other operating divisions of the company.

Q. I understand that, but what I am asking you is what the reasons are for the relative shift. I am trying to find what reason there was that you were able to find additional markets for your Fairmont operations. Were there any other reasons?

A. Well, the additional business which we were able to develop for the Fairmont mines accounts for the tonnage figures. It also in part accounts for the percentage figure, but that percentage figure is the relation of the Fairmont tonnage to the total production of the company as a whole, and we have five other mines, mining divisions, and any loss in any appreciable quantity in any of those other divisions would of necessity affect the ratio of the Fairmont production to the production of the company as a whole.

(540) The railroads I had in mind when I said that local railroads drew a large part of their engine requirements from the Fairmont District are the Baltimore & Ohio, Western Maryland, and Monongahela Railroads.

Besides the competition of Pittsburgh No. 8 and Connellsville, in northeastern Ohio, we encounter competition from western Pennsylvania, Pittsburgh District. There is some [fol. 1170] little competition from central Pennsylvania in some domestic business. It is very small.

It is pointed out that Exhibit 52, introduced by Mr. Kern, shows the tonnages of southern Crescent coal moving to these destinations. We do not compete with that to any extent from our Fairmont mines. Generally speaking, I should say that our competition with that coal would be a fair measure of the extent of Ohio No. 8's competition with that coal. (541) That is, as respects steam and certain grades of domestic consumption.

By "certain grades of domestic consumption" I mean the more ordinary domestic grades. We have some mines in the south ourselves. Under present market conditions we can compete for some of the Premium domestic coal business in northeastern Ohio under the normal differential conditions which previously existed from our Fairmont field.

(542) Our differential in relation to the south has not been changed. We do not compete with the south in marketing Fairmont coal in northeastern Ohio for steam purposes and ordinary domestic purposes. We do not have to

compete with the South for the premium domestic trade with our Fairmont coal. We can compete with it with other coals which the company produces. We produce those premium coals in other districts.

[fol. 1171] I have stated that northeastern Ohio represents 10 per cent of the total markets for our Fairmont operations. I have no figures available which would enable me to divide the other 90 per cent (543). The tonnage to lake was 13.3 in 1929. That figure is comparable with the 10 per cent to northeastern Ohio. That is lake cargo coal; 1930 was 16 per cent; 1931, 19 per cent; ten months of 1932, 14 per cent.

In splitting up the 90 per cent, I would give 15 per cent as an average for the tonnage that moves via the lakes. For all carriers, including local carriers, and not only tipple coal, but line haul, 27 per cent. That makes 42 per cent, plus the 10 per cent I gave for northeastern Ohio, or 52 per cent. The other 50 per cent goes all-rail to (545) the Middle Atlantic States, and some all-rail to New England. Some of its goes to Eastern Canada, principally the Province of Ontario, all-rail, except a little by water. That is substantially the market, except there may be a little scattered business here and there. The movement to Tidewater is relatively small; offhand I would not want to put a percentage on it (546). I would say it is not as great as northeastern Ohio.

Q. Then it comes to this: Your all-rail business to Middle Atlantic, New England and Ontario represents 48 per cent of your total business?

A. I would say that is substantially so.

Q. Can't you divide those three destinations roughly among the 48 per cent, by states?

A. No sir.

[fol. 1172] I have no figures to show our business in the State of Pennsylvania. I should say it was not very heavy.

On my Exhibit 97, the term "Commercial" in the heading is simply intended to distinguish the coal from railroad fuel. It does not mean steam and domestic as distinguished from special purpose (547). To the extent that we market special purpose coal in these Ohio No. 8 points, that is included in those figures. We do have competition at those points other than No. 8. I presume that the consumption

of all of those points is very much greater than the total of the No. 8 and Fairmont figures shown on the exhibit.

Q. In order to determine the effect of freight rates on the movement of coal to these points, all you need to have before you is the movement from other districts?

A. I think not.

Q. You think you can take these two and compare their movements to these points and the result indicates the effect of the 50 cent differential?

A. It indicates the inability of Fairmont coal to do more business in that area against competition.

Q. When you say against competition do you mean generally or confined to Ohio No. 8?

A. Well I think principally it is Number 8 competition that is more directly applicable to our Fairmont.

[fol. 1173] (548) Q. Might there not be competition at any one of these points which would furnish a serious obstacle, both to you and to Number 8? They burn other coal besides No. 8 and Fairmont coal, of course, don't they?

A. I presume there is some consumption of other coal, yes.

Q. And you could not tell what the competitive balance was at any of these points unless you knew what all the sources of supply were and what the trends from all these sources were?

A. Assuming that all the coals were all suited, substantially alike to the same consumption, I should say no.

Q. Have you noticed that if you take the Michigan and Indiana figures on your statement and compare 1929 with 1931, that Ohio fell off and Fairmont increased? Have you noticed that?

A. Yes sir.

Q. If my arithmetic is correct the business of Ohio Number 8 into the Michigan and Indiana points shown fell off in the amount of nearly 2,000 tons, 1929 and 1931, whereas your business increased some 1200 tons. Would you say that was due to the 50 cent differential?

A. I should say it was in spite of the 50 cent differential.

[fol. 1174] Q. Indicating that the 50 cent differential did not restrict your business to those points?

A. No, I would not admit that.

Q. Whether you would admit it or not, your figures show that it was a fact, do they not?

(549) A. No, I don't think they do. I don't think that those figures necessarily show that our business was unrestricted in that area.

Q. Then I ask you what I asked you before, in order to find out what the effect was—wouldn't you have a survey of the markets supplying those destinations and find out how they all fared and consider the entire movement in each point so far as competitive difficulties are concerned—I think you agreed with me a moment ago?

A. I think so, I think that is fair.

By Mr. Martin:

I have no figures showing the percentage of our total production in the Fairmont District that moved to Cleveland proper in 1931, nor to Akron, Lorain, Huron, Canton, and Massillon. I have no figures available.

[fol. 1175] By Mr. Herrold:

I mentioned that our company is operating 8 mines in the Fairmont District at the present time. It is rather difficult to say how many we operate in normal times (550). In the first place, what does one consider normal times, and in the second place, over a period of recent years the energies of our management, both executive and operative, have been to acquire greater efficiencies out of fewer operations, so that there has been a constant changing condition among our mines in the number of mines that were in operation. The old timers in our company tell me that at one time we had as many as 75 mines in operation. That was a good many years ago.

Our 8 mines in the Fairmont District are pretty generally scattered throughout the district.

Q. You don't recall how many rates were published from your mines in the Fairmont District in the tariffs of the railroads, do you?

A. No, I don't.

Q. I suppose they do actually carry rates from the mines that were formerly in operation?

A. On the theory of group rates, rates applying from groups, of origin points, it is possible that if some of the old operations (551) were to be reopened there would be applicable rates.

[fol. 1176] (551) Q. Yes, what I was getting at in order to figure an average distance from the Fairmont District, if you took the tariff publications and the alterations were published from all the mines you formerly operated, 75, and there are 8 now, it would probably be pretty hard to strike an average distance?

A. Well, as to that, I presume that the 75 mines, having been in operation so many years ago and so many changes having taken place in our operating region in the following years, that the carriers have undoubtedly, to a very appreciable extent, eliminated, kept pace in their tariffs, in other words, with the changes and shrinkages which have taken place in the production of the region.

By Mr. Brown:

I do not have any records here as to where the lake billed coal goes after it leaves the lake ports. I don't think there is any of it going into Buffalo in recent years, or Detroit, or Chicago. (552) Some goes to Duluth. Whether any has gone to Western Canadian upper lake ports is something I can't answer, because these sales would be under the jurisdiction of our subsidiary company in St. Paul that operates our docks at the head of the lakes. None of it has been going to Toledo recently that I know of.

From the Fairmont field there is very little coal going to Detroit. We supply our business in that area from other operations.

[fol. 1177] (553) The attitude of our customers in Cleveland who have been dealing with us over a period of years was that they would prefer to continue to deal with us if it could still be done on a basis no different from that which had prevailed.

FRANK L. HORNICKEL was called as a witness and, having been duly sworn, testified as follows:

Direct examination.

By Mr. McVann:

Frank L. Hornickel, of Cleveland, Ohio. I am President of the Anchor Coal Company, of Cleveland, Ohio. I have

been engaged in the business of producing coal about 16 years.

(554) The Anchor Coal Company is located in the Kanawha District of West Virginia, on the Chesapeake & Ohio Railway, at Highcoal, Boone County, on the Coal River extension of the Cabin Creek Branch.

In recent years we have marketed our coal in Cleveland, Akron, Canton, Lorain, Painesville, Elyria, Berea and Amherst in northeastern Ohio. Our sales at those points have decreased materially since 1929. At those and a few intermediate points I have not specified we sold in 1929, 35,150 tons; in 1930, 22,062 tons; in 1931, 13,432 tons, and in the eleven months of 1932, 10,792 tons. The coal that has displaced ours in these markets is chiefly Ohio No. 8 and Hocking coal.

[fol. 1178] I attribute this loss of tonnage mostly to the large freight rate handicap or differential against West Virginia, but the Ohio No. 8 coal producers have (555) improved the preparation of their coal and they have also succeeded in reducing their labor costs. The freight handicap against our coal was 65 cents in Cleveland, for example, in favor of Number 8 mines, our rate being $2.39, and the Number 8 rate $1.74. This handicap of 65 cents enabled the Ohio producers to undersell us, and this, together with the improvement in preparation and the decreased labor costs displaced our coal to the extent of the figures I gave above.

To this handicap has been added the additional reduction of 29 cents which was made on August 1, in the Number 8 rate to Cleveland and other points, making the total difference 94 cents per ton. Under this additional handicap I am afraid it will be impossible for us to compete with the Ohio coal at points in northeastern Ohio. Even if the old difference of 65 cents was restored, we would still find it very difficult to compete with the Ohio No. 8 on our freight rate of $2.39. As a matter of fact, just before the recent reductions were made in the Ohio rates, I was planning to start a campaign to try to recover some of our lost business in this territory, but when the 29 cent reduction was announced [fol. 1179] in the Number 8 rate and our rate remained at $2.39, I abandoned this idea, as I was convinced it would be impossible to overcome the additional handicap.

Cross-examination.

By Mr. Herrold:

(556) Our principal markets are Indiana, Ohio and Michigan, Ohio being our chief market; lake cargo coal, a very little in Virginia and North Carolina, and a little coal goes west into Illinois and Iowa, but a very small percentage. The principal markets in northeastern Ohio where we market our coal are Cleveland, Akron, Canton, Lorain, Berea, Strongsville, and then of course we have several other smaller cities in there.

I realize, of course, that the decrease in tonnage since 1929 has been partly due to the depression; I would not say in a great measure.

Our coal is high volatile coal. The figures I am giving you — practically 100 per cent domestic.

I don't know exactly what they are paying in Ohio right now, (557) but at one time a year ago our labor costs in the Cabin Creek District and the Coal River District were slightly higher.

Q. Your coal is shot down practically clean, you don't have to contend with any slate or anything like that?

A. Oh, yes, we have three pounds in our seam of coal, [fol. 1180] besides the draw slate.

Q. What is the size of the vein?

A. Our coal lies 5½ to 7 feet in our particular mine. I am speaking entirely for the Anchor Coal Company in this testimony—no other mines.

The Anchor Coal Company has no production in any other district than the Kanawha District. We do not sell any coal in northeastern Ohio except domestic coal. This year we will market slightly over five per cent of our production in northeastern Ohio. About 35 per cent of it will be to the lakes; Indiana, Ohio and Michigan, outside of northeastern Ohio, will (558) probably take 50 per cent of our coal. The remaining 10 per cent would be scattered between Illinois, Iowa, Wisconsin and Virginia and North Carolina. Those are approximate figures. I am including nut and slack, which is our steam size in these figures, but outside of Ohio and Michigan, outside of a little local coal in West Virginia there is none of our steam coal goes in any of these other states.

Our domestic coal in northeastern Ohio is not a premium coal. It is sold under the trade name "Anchor." It is hard to say what the current price is. The selling of coal has ceased to be really a sale, it is, "what do you give me?" Prices today on our 4-inch block range from $1.25 to $1.50, at the mine. We can't get out on less than $2.39 freight rate [fol. 1181] anywhere.

(559) Our price at the mines, today, to the dealers, is $1.50 on our 4-inch block. Our $1.25 price there is to wholesalers and I can't give you any stated retail price because that depends, of course, upon your freight rate and also the margin which the dealer puts upon your coal. We have no control over our delivered price. Our coal sold today in Cleveland to the consumer for $6.50 to $7 a ton, when they sell any. That is what the man pays for it in his cellar, and I am giving you our highest priced domestic size. I haven't any idea what that same consumer would pay for a ton of Number 8 coal. I would like to add there, Mr. Ballard, under the price of our coal with the Cleveland dealers—we formerly, I think in the year 1927, put about 21,000 tons of domestic coal into Cleveland. This year so far we have put 1,390 tons. The Cleveland dealers have stopped selling (560) Anchor coal. Ohio coal has forced it off the market and the only Anchor coal carried in Cleveland today is carried by a few of our old dealers who will put in a car once in a while and will have it when it is demanded, consequently they are selling that coal on a much higher margin than other coal. I have been unable to interest them in pushing our coals, because the business has gone to Ohio coal.

[fol. 1182] By Mr. Martin:

When I spoke of 5 per cent of our production going to northeastern Ohio I don't think I included in that destination territory any points to which Ohio intrastate rates have not been reduced. My figures are based on towns where that intrastate rate was reduced.

By Mr. Burgess:

In 1929 and 1930 we sold our domestic coal in Canton. (561) Our rate at that time as compared with the Number 8 rate into Canton was $1.26. In other words, we were under

a freight handicap in 1929, 1930 and 1931 into Canton of $1.13 on our Anchor coal as compared with Ohio No. 8.

Our mines are located on the Chesapeake & Ohio, on the Coal River extension of the Cabin Creek Branch. We own two mines with a total production of about 200,000 tons this year. The haul from our mines to Cleveland I would say is approximately 350 miles. The road mileage driving is 250.

By Mr. Bronson:

Q. Did I understand you to say that when the Ohio No. 8 rates were $1.74 to Cleveland and you had a $2.39 rate, which would mean a differential of 65 cents against your company, you were able to sell your coal and in the Cleveland market for domestic use freely?

(562) A. Not freely, we have always had to work like the devil to sell it there.

[fol. 1183] A. S. Boden was called as a witness and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Gutheim:

A. S. Boden, Secretary and Traffic Manager, Western Pennsylvania Coal Traffic Bureau, which position I have occupied for two years. Prior to that I had about 19½ years experience in rate and tariff work, both with railroads and industrial concerns, all of which was in Western Trunk Line territory.

The Western Pennsylvania Coal Traffic Bureau was a protestant in both I. & S. 3801 and I. & S. 3833 and is here as protestant in both of those proceedings now. In addition we have filed our individual complaint, Docket 25590, under sections 1, 3 and 13. We have a very large market interest in Ohio and particularly in northeastern Ohio and therefore have an interest in all of these various proceedings.

(563) The Western Pennsylvania Coal Traffic Bureau is a voluntary association of individual firms and corporations mining and shipping bituminous coal in the Pittsburgh, Freeport and Connellsville Districts of Western Pennsylvania.

Their normal annual production varies between fifteen to twenty-five million tons of bituminous coal, this being steam, domestic, gas, metallurgical and by-product coal. The coal [fol. 1184] produced in Freeport is almost entirely for steam and domestic use. The coal produced in Connellsville is almost entirely the special purpose coal used for gas and by-product coke production and also in the metallurgical industry.

In the Pittsburgh District, the western side of the district produces steam and domestic coals almost entirely. The eastern side of the district produces almost entirely the special purpose coal. In all three districts the most of the mines are strictly all-rail mines. In Pittsburgh and Connellsville we have some rail and river mines and a few strictly river mines.

Western Pennsylvania coal is sold in C. F. A. territory, where much the larger part of our coal is sold in northeastern Ohio; in the lake cargo market, (564) in the Buffalo-Niagara frontier markets, and in the eastern markets.

Q. What are the other bituminous coals you meet in competition in these markets?

A. In the C. F. A. territory it is from Ohio and the various Crescent districts; in the lake market we meet the same competition as in C. F. A. territory. We meet in the Buffalo and Niagara frontier territory competition from Ohio and northern West Virginia. There is also a good deal of tonnage from the Central Pennsylvania Districts, mainly Reynoldsville. Some of the southern Crescents also get in with their coal. In eastern territory we meet all of the more easterly Pennsylvania districts, as well as Maryland and northern West Virginia. We also meet the southern coals principally via the ocean routes.

Q. You have differentiated the Western Pennsylvania [fol. 1185] coals between steam and domestic on the one hand and special purpose coal on the other. Do you know what the situation is in that respect in Ohio?

A. It is generally recognized that special purpose coal, namely gas, by-product and metallurgical, are not produced in Ohio.

Mr. Gutheim: Mr. Examiner, we now offer as our first exhibit the colored map which is the first in the group that has been exhibited.

(Complainants' Exhibit No. 98, Witness Boden, received in evidence.)

Q. Will you describe this map, Mr. Boden?

A. This map shows in colors the origin districts involved in our complaint, both the three complaining districts in Western Pennsylvania and the four eastern Ohio districts. It also indicates the extent of the destination territory involved. There are some points shown on the map that are not involved in the complaint. For instance, the rates to Erie and other Pennsylvania destinations as well as to Sandusky and Galion are not in issue. The complaint brings into issue the rates in Ohio on and east of the Sandusky and Galion line and on and north of the line of the Baltimore & Ohio from Columbus to Bellaire, as well as to the points situated in Ohio on the Ohio-Pennsylvania state line. The origin district, as well as the railroads are indicated by the legend at the righthand side of the page.

Q. Will you take up this next exhibit, No. 99, and explain [fol. 1186] how it is prepared?

(Complainants' Exhibit No. 99, Witness Boden, received in evidence.)

As indicated at the top, it shows the tonnage from the Western Pennsylvania districts and from all the (566) Ohio districts into all of Ohio—the upper half being the tonnages from the western Pennsylvania districts and the lower half the shipments from all Ohio districts.

The destinations shown are classified exactly as in the carriers' tonnage statistics as published by the Ohio Bureau of Coal Statistics. You will find in the fourth column a reference to commercial tonnages. These also are as reported by the carriers, and as I understand it, include everything except what they describe as lake-billed and non-revenue fuel.

Q. Will you illustrate the showing on this exhibit by describing the situation with respect to Akron, Ohio and with respect to all Ohio?

A. The western Pennsylvania districts shipped into Akron in 1930, 449,944 tons. This tonnage, as indicated in the next column, is 4.3 per cent of the total tonnage from our three western Pennsylvania districts to all of Ohio. It is

also 2.7 per cent of the total tonnage from the same western Pennsylvania districts into all of C. F. A. territory. This tonnage is also 19.8 per cent of all of the Appalachian tonnage shipped into Akron.

In the bottom summary there is indicated the tonnage [fol. 1187] shipped from these western Pennsylvania districts to all Ohio. It will be noted that the western Pennsylvania district tonnage into this Ohio territory is 62.2 per cent of their total shipments into C. F. A. territory. It is also 29.2 per cent (567) of the total receipts from all the Appalachian districts into all of Ohio.

Comparatively, as shown in the lower bracket on sheet 1, the coals shipped from the Ohio districts to Akron aggregated 1,256,596 tons. This was 17.4 per cent of the total from all the Ohio producing districts to all of Ohio. It was 10.4 per cent of the total from all Ohio districts to all C. F. A. territory, and it was 55.3 per cent of the total receipts in Akron from all of the Appalachian fields. Also, the Ohio mines' shipments commercially to Ohio destinations constituted 59.6 per cent of their total shipments into C. F. A. territory and aggregated 20.3 per cent of all the shipments from all the Appalachian fields into the State of Ohio.

It will be noted that the western Pennsylvania tonnage is principally into northeastern Ohio, which is the territory involved in this proceeding. You will notice that to Akron, Canton, Cleveland, Lorain, Massillon and Youngstown, the western Pennsylvania shipments were about 90 per cent of their total Ohio shipments. You will also observe that the western Pennsylvania shipments to such destinations as Cincinnati, Columbus, Dayton and Springfield are relatively very light. And the Cincinnati tonnage, (568) which [fol. 1188] is the only heavy tonnage item to southern Ohio is practically from Connellsville and is therefore special purpose coal.

My judgment, therefore, is that the western Pennsylvania tonnage to what is called various Ohio destinations is practically all tonnage for northern, and mainly northeastern Ohio, and taking the situation as a whole it would be my judgment that 95 per cent of all of the western Pennsylvania shipments into Ohio go to northern, and for the most part to northeastern Ohio.

The second sheet of the exhibit indicates what the tonnage is from eastern Ohio origin districts as well as from the

western Pennsylvania districts into principal consuming points directly involved here. It will be noted that to these principal points the tonnage from the western Pennsylvania districts is 4,300,000 tons, and from eastern Ohio, 3,100,000 tons, and from the Pittsburgh district alone 2,371,000 tons. From Connellsville, 1,817,365, and from the Freeport district, 111,163 tons.

Of the tonnage moving into Akron, the eastern Ohio origin districts shipped 1,245,524 tons, this being 73 per cent of the total tonnage received at Akron from the districts under columns 1 and 2. The western Pennsylvania district tonnage to Akron was 27 per cent of the total from western (569) Pennsylvania and eastern Ohio districts. Pittsburgh accounted for 26 per cent of this 27 per cent figure. I would like to note in this connection that Mr. Kern's Exhibit 13 [fol. 1189] indicates that Akron has no by-product coke ovens, blast furnaces or iron or steel plants. Apparently, therefore, coal moving to Akron must be entirely steam and domestic. We got in 1930 but 27% of the Western Pennsylvania and Eastern Ohio competitive tonnage; Eastern Ohio got the other 73 per cent.

I have already said that in western Pennsylvania the coal is of two kinds, first the steam and domestic coal, and second, the special purpose coals, whereas, in Ohio it is all steam and domestic. In the Freeport district the coal is generally considered as steam and domestic coal almost entirely; in Connellsville it is special purpose coal almost entirely. In the Pittsburgh district both kinds are produced to a very considerable extent. On this third sheet of the tonnage exhibit I have attempted to show with respect to the principal destinations here involved in Ohio just what the tonnage of steam and domestic coal is from Ohio, being all of the Ohio shipments, and what the steam and domestic coal is from Pittsburgh, separated, as is shown on the next sheet of the exhibit. I would like to say right here that for reasons which will be stated at greater length subsequently (570), there are certain limitations upon attempted differentiation of the coal production of the three Pennsylvania districts between steam and domestic on the one hand and gas and metallurgical on the other.

[fol. 1190] The point I wish to bring out particularly just now is that the markets of most importance for Pittsburgh shippers of steam and domestic coal are those of Cleveland

and Lorain, to which the Pittsburgh and West Virginia reduced its rates, after the Ohio intrastate reductions.

The method in which we determine the amount of the steam and domestic shipments from the Pittsburgh district is set forth on sheet 4 of the exhibit. We have taken the railroads separately and indicated the kinds of coal produced on their lines; for instance, it will be noted that coal from the P. & W. V., Montour, P. R. R. Lines West, and the P. C. & Y., all of which serve the west side of the Pittsburgh district, are included as steam and domestic coals, the special purpose coals being assumed to come from the B. & O., P. R. R. Lines East, and the P. & L. E. railroads. It must be understood that in separating the coal produced between steam and domestic on the one hand and gas and by-product on the other in this way it is bound to be more or less an approximation. There is, however, some steam and domestic coal on the B. & O. R. R., on the western and southwestern branches, in the Pittsburgh district. (571) There is also steam and domestic coal on the P. & L. E. But we have been unable to segregate the steam and domestic coals from the special purpose coal on these two railroads and have therefore included both kinds in the figures set opposite for the B. & O. and the P. & L. E. In other words, although we know positively that some of this B. & O. and P. & L. E. coal production is actually sold for steam and domestic use, it is included in this com- [fol. 1191] pilation as gas and metallurgical coal. I would like to note here that Mr. Fitzpatrick, of the P. & L. E., when on the witness stand here a few days ago, gave the opinion as a result of his investigation of the subject, that more than 50% of the P. & L. E. originating coal is steam and domestic. In 1930 you will observe that the steam and domestic coal, so computed, amounted to 63 per cent of the total Pittsburgh shipments to Cleveland and Lorain and in 1929 they amounted to 71 per cent.

Since I have thrown all of the production of the B. & O., the P. R. R. East and the P. & L. E. in as special purpose coals, it follows that the figures I have computed as a total of steam and domestic coal represents the minimum from the Pittsburgh district on the basis of my understanding of the coals. On the basis of those figures, I have been able to reach an approximation of total Western Pennsylvania shipments (572) of steam and domestic coal

to these Northwestern Ohio territories. These figures are as follows:

As indicated in sheet 3 from the Pittsburgh District there is 1,506,162 tons, arrived at in the manner just described. Added to this there would be 111,163 tons from the Freeport District as shown on sheet 2. We do not know the steam and domestic tonnage from the Connellsville District nor do we have the separation of steam and domestic for the B. & O. and P. & L. E. lines in the Pittsburgh District. But the separation, as far as we are able to determine it, will bring the total to these five destinations [fol. 1192] from the western Pennsylvania Districts to approximately 2 million tons of steam and domestic coal in 1930.

It will be noted on sheet 1 of this exhibit that from these western Pennsylvania Districts there was shipped to what the carriers' tonnage statistics show as "various" Ohio destinations some 952,000 tons of coal. Of this tonnage the Pittsburgh District alone shipped 906,109 tons, the balance coming from the Connellsville and Freeport Districts. As the classification of destinations on sheet 4 shows the figures for most of the large steel producing centers individually, it may reasonably be assumed that this tonnage to the "various" Ohio destinations is not special purpose coal, but on the contrary is largely steam and domestic coal. We therefore would have from 2½ to 3 million tons of steam and domestic coals accounted for from western Pennsylvania into this northeastern Ohio (573) territory directly involved in the Section 13 case out of the total of 4,299,872 tons from the three western Pennsylvania districts, as further indicating that the northeastern Ohio business of these three western Pennsylvania districts is mainly steam and domestic coal. I wish to add that our members whose mines are located in the eastern or gas coal producing end of the Pittsburgh District, report but very little business in northeastern Ohio. Of course, in more prosperous times we would expect our steam and domestic tonnage to increase considerably above those figures.

[fol. 1193] About 90 per cent of the Buffalo, Rochester and Pittsburgh production in the Reynoldsville District is from the Rochester & Pittsburgh Coal Company and 80 per cent of their shipments into northeastern Ohio are steam and domestic coals.

I have stated that my first allocation of these tonnages indicated that of the coal that went to Akron for steam and domestic use, 73 per cent came from eastern Ohio, 27 per cent from western Pennsylvania. On the basis of (574) additional studies made in this exhibit, as shown on sheet 3, eastern Ohio gets 81 per cent while Pittsburgh got but 19 per cent of the steam and domestic coal.

[fol. 1194] Testimony Taken at Columbus, Ohio, December 17, 1932

Direct examination of A. S. Boden (cont'd).

By Mr. Gutheim:

(575) In connection with my exhibit 98, which is the map, the line of the Pennsylvania Railroad operating from Kiskiminetas Junction up to Butler on westbound traffic is the same rate district as the Pittsburgh District. It is not in the Freeport District. The Freeport rate is the same and has been the same, with very few exceptions, as the Pittsburgh rate. Cleveland is the same.

By Mr. Gutheim:

Q. Are you informed, Mr. Boden, as to the extent to which (576) the recent reduction of rates on bituminous coal from the Ohio Districts, and of the Pittsburgh and West Virginia in the Pittsburgh District, with no like reductions from other Western Pennsylvania Districts, has affected the business of your members in the Western Pennsylvania Districts?

A. Since the changes in the rates within Ohio the shippers in Western Pennsylvania districts have resorted to one of the three methods in an attempt to meet the situation. First, we have some members who are staying in the market under the additional handicap of 29 cents per ton, and so to speak, absorbing the loss in the hope of prompt relief from this commission.

Second, there are one or two shippers who have found it possible to ship some coal via river and rail and meet the [fol. 1195] Ohio reductions in part. This results in a situation where they can reduce slightly the 39 cents differential against them.

Or, third, they have to go out of the business and this they have done where the other two methods have not permitted them to stay in the market.

Q. Have you made any calculations, Mr. Boden, of what the revenue results to the carriers are from these changes in shipping practices?

A. It is difficult to make accurate computations of the results upon the carriers' revenues from such rate changes as have already occurred and which might result from these proceedings. I might, however, comment upon one position which the carriers have adhered to (577) form the very inception of the controversy and that is the statement that reductions in the rates from western Pennsylvania would be a needless sacrifice of revenue because much of the coal moving from western Pennsylvania is of the gas and metallurgical variety which is not produced in Ohio. The first weakness in that position of the carriers is that a very large volume of this western Pennsylvania coal that is actually suitable for gas and metallurgical purposes is nevertheless sold in the steam and domestic trade and can be displaced by Ohio coal. The next point is that to whatever extent the steam and domestic coal consumers shift their purchases to eastern Ohio the carriers will earn on that business 39 cents a ton less than they earn were that tonnage shipped from western Pennsylvania.

[fol. 1196] Q. When did you first hear this tale of gas and metallurgical coal is bound to move everywhere and therefore it would be a needless sacrifice of revenue to meet the rate in that coal?

A. That was mentioned in the argument before the Suspension Board in I. & S. 3801. (578) That was about the time this thing was all beginning. It was mentioned by Mr. Kern, as agent for all the carriers.

It must be kept in mind that not only can the Ohio consumer satisfy his requirements for steam and domestic coal in the Ohio producing districts on the W. & L. E., but also from the mines in those districts on any other lines.

As I see it, therefore, against the loss which the carriers might sustain of 29 cents per ton on the purely gas and metallurgical coals which might thereafter be shipped from western Pennsylvania, they are now losing 39 cents per ton and will continue to lose 39 cents per ton on the steam and domestic business which is shifted from western Penn-

sylvania to Ohio, so long as this undue prejudice which they admit, continues.

I have already said that some of our producers are absorbing the additional handicap of 29 cents laid upon them by our carriers, and of course in such instances the carriers' revenues have been preserved, but only at the expense of an industry which is generally recognized to be in a much worse state financially than are the carriers.

[fol. 1197] (579) The only published territorial density figures that I have found are those published in the Commission's Statistical Report No. 28105 and from these for the year it covers, 1927, I have shown in the top block of this next exhibit, No. 100, a comparison of Trunk Line and Central Territory.

(Complainants' Exhibit No. 100, Witness Boden, received in evidence.)

It will be observed that there is no great difference between the two territories. These territories, however, cover a very wide area and I have therefore for the same year, 1927, and for the year 1930 for which the same statistics are most recently available, made a comparison of the densities of individual lines. The first two, the P. & L. E. and the B. & L. E., are essentially Western Pennsylvania railroads. The W. & L. E. is essentially a northeastern Ohio railroad. You will observe that the density of the two essentially Western Pennsylvania railroads is about three times that of the Wheeling & Lake Erie.

(580) The asterisks at the bottom of the exhibit refer to the authority for these figures, which is I. C. C. Statement of Operating Revenues No. 31200. Apparently they were left off.

[fol. 1198] So far as I have been able to learn, there are no published figures which show the density of the individual lines comprising these systems which serve the territory here involved. However, in the Eastern Class Rate Investigation before this commission the carriers made studies of the traffic density of the various lines of their systems and I have studied these in detail. On the Pennsylvania system much the greater density is found on the main lines east of Pittsburgh. Second to this the greatest density is found on the Fort Wayne route west of Pittsburgh, that is on the route over which the western

Pennsylvania coal travels into northeastern Ohio. On that Fort Wayne route the density up as far as the Sandusky-Galion line is very considerably greater than is the density of the system west of that point. The route of the main line of the Pennsylvania Panhandle division from Pittsburgh west does not have such a heavy density as does the Fort Wayne route, but nevertheless the density between Pittsburgh and Columbus on this Panhandle Division is considerably greater than on the system west of Columbus. The lines of the Pennsylvania from junctions with the Fort Wayne route to the lake cities in northeastern Ohio, that is, Cleveland and Ashtabula, are again lines of heavy density though not of such great density as the (581) main westbound line of the Fort Wayne route up to the Sandusky Galion border.

The New York Central system serving the Pittsburgh dis- [fol. 1199] trict consists of the P. & L. E. as far north as Youngstown. Then the N. Y. C. proper runs from Youngstown to the lake front at Ashtabula. This entire P. & L. E.-N. Y. C. line has the heaviest density of the N. Y. C. system and second to it in C. F. A. territory is the line along the Lake Erie front. In other words, this heavy density persists all the way from the Pittsburgh district right into Cleveland. Compared with it the density of N. Y. C. system lines serving the mining territory in northeastern Ohio is very, very light, bearing out what Witness Heinisch of the N. Y. C. admitted. Furthermore, it is to be observed that there is nothing in the way of traffic density on the N. Y. C. system lines west of Cleveland that compares with the density of the P. & L. E.-N. Y. C. route from the Pittsburgh district right into Cleveland.

On the B. & O. you can visualize two lines of railroad, one from Connellsville north through Glenwood and Callery to New Castle Junction and thence to Youngstown and beyond; and the other from Grafton and Clarksburg, West Virginia, up through Benwood Junction and Holloway north to the lake front. The first of these lines serves the Connellsville and Pittsburgh districts. The other serves the Fairmont district and comes up through the Cambridge and Ohio No. 8 districts.

(582) On the first of these lines coming up from Connellsville, the density throughout is far greater than is the density from Grafton and Clarksburg north as far as Ben-

wood Junction. North of Benwood Junction where the eastern Ohio coal comes on to the B. & O. line, the density increases and more closely approximates the density of the line from Connellsville through Glenwood Junction and [fol. 1200] Callery north. This bears out what Witness Hewes testified to concerning the density on the Ohio lines. However, it may be observed that on this entire line of the B. & O. from Connellsville through Glenwood Junction, Callery and New Castle Junction to points north and west beyond, the density is much better balanced north and south than is the case on the line of the B. & O. coming up through eastern Ohio. I wish also to say that these density charts indicate with respect to the B. & O. system that the density on the line coming up from Connellsville through the Connellsville and Pittsburgh districts to Youngstown and beyond, is generally greater than on the B. & O. lines west.

The main coal producing areas in western Pennsylvania are served by the P. R. R. and P. & L. E. and B. & O. and their short line connections. The main routes come down the Youghiogheny and Monongahela river valleys and in the case of the Pennsylvania (583) and P. & L. E. continue as water level lines along the Ohio River and its tributaries up to Youngstown. In the case of the B. & O., that line leaves the water level at Glenwood Junction, a short distance south of Pittsburgh proper and runs across country through Callery, to again meet the water level lines of the P. & L. E. and P. R. R. about at New Castle Junction, from which point it parallels them into Youngstown. Going from Youngstown north to the lake front you have the lines of the P. R. R., the N. Y. C., the B. & O., and the Erie, all of which, speaking generally, must negotiate the slight ridge in the terrain north of Youngstown and then run across generally the same kind of territory to the lake front, that territory involving no particularly severe grades [fol. 1201] or curves.

The lines of the P. R. R. and the B. & O. running west through Ohio are main line routes, so also is the N. Y. C. line along the Lake Erie water front. All of these lines which I have discussed I might say are railroads of the highest standing, entitled to be considered as the P. R. R. for years advertised itself, standard railroads of the world.

I have made other studies of transportation conditions

on the lines via which the rates here involved and the competitive Ohio rates apply, and I submit the result in my next exhibit, No. 101, which is a 4-page document. (584)

(Complainants' Exhibit No. 101, Witness Boden, received in evidence.)

Mr. Webber: Do I understand now, Mr. Examiner, that Exhibit No. 101 has been offered, the first page of which purports to be a copy of Exhibit No. 258, taken from the Lake Cargo Coal Cases? And I notice it is said to be a carriers' exhibit, and Mr. Triem offered it, not as a representative of the carriers' views with regard to the Ackerman theory, but merely as a showing of what a certain exhibit of Mr. Ackerman's would be if the proper calculations were used, but distinctly disapproving of the theory and of the exhibit offered by Mr. Ackerman. I think it is objectionable. We have no opportunity whatever to examine Mr. Triem on it, nor Mr. Ackerman, and as to the remaining pages of the exhibit, as I undestand it, those are calculations which constitute a part of certain exhibits introduced by Mr. Ackerman, who also is not here to be cross examined.

[fol. 1202] Mr. Gutheim: Mr. Examiner, Exhibit No. 258 in the Lake Cargo case was, as Mr. Webber says, an exhibit introduced by Witness Triem. The circumstances were this, that Witness Ackerman, for the complainants, previously introduced certain studies purporting to show the expenditure of locomotive tractive effort in handling certain lake cargo coal over the same routes, which are the routes involved here. Witness Triem took those results of Mr. Ackerman and on Exhibit No. 258 he sets up (585) comparatively another unit of measurement which—while I don't know if he fathered it entirely, he certainly took the position it was something better than Mr. Ackerman had used as a unit of measurement, and that was final average pounds gross ton miles handled per 1,000 tractive pound hours, and that was an original figure offered for the consideration of the commission in that proceeding by the defendants there and the defendants here.

Mr. Webber: Mr. Examiner, I think Mr. Gutheim has not stated the statement that was made by Mr. Triem in offering that exhibit. It was not offered for the purpose of showing the actual tractive effort or as approving the theory

that Mr. Ackerman had presented. It was positively and definitely opposed to any such theory, but was merely a correction of figures that Mr. Ackerman introduced, as I remember it. Now I have no objection if Mr. Gutheim will introduce this with the distinct understanding that the first stage of the exhibit was not any admission by the carriers [fol. 1203] of the correctness of the theory, or even in adoption of the theory, and also if it is understood that there will be a chance to examine Mr. Ackerman as to the remaining pages of the exhibit.

Mr. Gutheim: Well, Mr. Ackerman is not my witness in this proceeding and I don't know if he will be a witness in this proceeding, and I can not submit him for cross-examination.

Mr. Webber: Is Mr. Boden prepared to stand cross-examination (586) on these exhibits?

Mr. Gutheim: He is prepared on these exhibits, which are nothing but arithmetical calculations of the basic data shown on the Ackerman and Triem exhibits. Mr. Boden has added nothing to these exhibits in the Lake Cargo case exhibits except a little arithmetic which you are entirely capable of performing yourself, Mr. Webber.

Mr. Webber: But the commission did not approve that theory upon which the exhibits were prepared.

Mr. Gutheim: I am rather loathe to say what the commission approved in any decision nowadays.

Exam. Trezise: Very well, gentlemen, there are certain facts shown on here regarding locomotive tractive effort. There seems to be some disagreement between counsel as to just what the exhibit was introduced for in the other case. Under the circumstances the examiner will accept it. He will run the risk of making a mistake, and if the facts are wrong—these facts are within the possession of the railroads, are they?

[fol. 1204] Mr. Orcutt: The Ackerman exhibit is in the possession of the railroads.

Exam. Trezise: They can be determined by the records of the railroads, and you may have an opportunity to correct any errors that are in there.

Mr. Webber: Mr. Examiner, may it be distinctly understood that (587) the first page of that exhibit is not an admission by the carriers of any of the facts that are set out there?

Mr. Gutheim: Mr. Examiner, I will be glad to relieve Mr. Webber's conscience on that point. I won't charge him with any admission of the responsibility of anything that Mr. Ackerman put into that record in the Lake Cargo Case, which is now put into this record here, but I can't refrain from charging Mr. Webber with the fact that his own witness in that proceeding, Mr. Triem, was the first witness to put in the unit of measurement entitled in Mr. Triem's exhibit and this exhibit, "Gross Ton Miles per 1000 Tractive Pound Hours," and it is my further recollection that Mr. Triem adopted the second unit of measurement, because he said Mr. Ackerman's unit of measurement did not give sufficient consideration, if indeed any consideration, to the element of time in transit.

Exam. Trezise: Very well, gentlemen, let us proceed.

The Witness: On the first page I have shown from the original exhibits the tractive effort expenditure and the gross ton miles of freight handled per thousand tractive pound hours reported by the Commission in Lake Cargo [fol. 1205] Coal Cases, 1930, 181 I. C. C.-37, at page 48. To do this on sheet 1 of this exhibit it was necessary only to take Exhibit 258 in that proceeding, and in the study of the movement there shown from Pittsburgh and Ohio No. 8 districts to Cleveland, to take the Mingo Junction to Cleveland figure individually because that represents the Ohio No. 8 movement (588), and is so indicated by Exhibit 257. The balance of the Pittsburgh and Ohio No. 8 districts' showing to Cleveland on Exhibit 258 represents solely the Pittsburgh district to Cleveland service. You will observe that the result indicates an excess of about 30 per cent from Ohio No. 8 as against Pittsburgh in the expenditure of tractive effort; and the gross ton miles handled per thousand tractive pound hours from Ohio No. 8, are only about four-sixths of what are handled from Pittsburgh.

On the second sheet all that has been necessary is to take Witness Ackerman's figures on the exhibits there noted, deduced in the same way as I have just described. You will observe from the appendix to the commission's report at page 60 that the movement from Pittsburgh to Cleveland was reported in consolidation with the movement to other ports. I have merely picked out the Cleveland figures individually in order to show on the basis of Witness Ackerman's data, the average pounds of tractive effort

required to haul one gross ton of coal one mile via the routes shown from Pittsburgh, from Ohio No. 8 and from Cambridge to Cleveland. You will note that from Ohio No. 8 [fol. 1206] about forty per cent more tractive effort is necessary than from Pittsburgh, and from Cambridge more than twice as much as from Pittsburgh.

Mr. Day: Mr. Boden, I wander, as a matter of information—I was not in the Lake Cargo Case and I am not familiar with (589) tractive effort study—can you explain in just a few words just why the miles of service between these points is so much greater than the actual mileage?

A. That, I think, as explained there, was the total amount of miles of service performed by all of the locomotives used in that study.

Q. For instance, you have 492 miles from Pittsburgh to Cleveland in the first block of figures there, and that is about 3½ times the actual distance, isn't it?

A. That is correct, and you have three lines there, and over that period that was the total amount of service performed for the study.

Q. Represented the efforts of a number of locomotives?

A. Yes sir.

The Witness: Sheet 3 is a similar study of the movement from the same three districts to Lorain via the B. & O., made in the same way. Here the movement from Pitts- [fol. 1207] burgh via the B. & O. requires a slightly greater expenditure of tractive effort than does the movement via that line from Ohio No. 8 and Cambridge.

The fourth sheet is a consolidation of the results previously ascertained for Cleveland and Lorain individually (590) and shown on sheets 2 and 3. The result indicates that in the movement of coal from Ohio No. 8 the tractive effort expenditure is about 16 per cent greater than from Pittsburgh, and in the case of Cambridge about 31 per cent greater. This computation of the composite result with respect to Cleveland and Lorain combined, is computed, of course, without regard to the tonnage handled to each destination.

Q. Now with particular reference, Mr. Boden, to I. & S. 3801 and 3833, have you an exhibit which shows the rates which were reduced by the P. & W. V. R. R. and comparisons with other Ohio rates?

A. Yes, that is my Exhibit No. 102.

(Complainants' Exhibit No. 102, Witness Boden, received in evidence.)

On this exhibit I have taken the distances from the Ohio No. 8 district and from the Pittsburgh district to Cleveland and Lorain, first from the mines on the Wheeling & Lake Erie in the No. 8 district to Cleveland via that line, and also via the Wheeling & Lake Erie jointly with the Erie Railroad. Under the third column is shown the straight [fol. 1208] average distances from those mines, which is 156 miles, the next column shows the present rate at $1.45. From the Pittsburgh district in the next line there is shown the distance from the P. & W. V. mines to Cleveland which are computed via the P. & W. V. in connection with the W. & L. E. Railroad, this figure being 160 miles and as indicated, the rate is $1.55. The exhibit shows like comparisons to Lorain.

(591) It also shows similar comparisons from the Ohio No. 8 and the Pittsburgh districts from the mines on all railroads except the W. & L. E. in the case of the first, and the P. & W. V. mines from which the $1.55 rate applies, in the second. Finally, it shows similar comparisons also from all mines on all lines in the Ohio No. 8 and the Pittsburgh districts, via all routes.

[fol. 1209] The tariff authority for all those distances and rates will be the very last exhibit which I will introduce, and I would not be able to give you the exhibit number, but it is the last one in that group. They are the distances from all tariff routes, from all mines or stations listed as such, indicated on my last exhibit.

I have made a comparison of the P. & W. V. Railway reduced rate with other rates of about the same amount which apply to the transportation of bituminous coal in this general territory and in such manner as to indicate the amount of service that (592) is offered by the carriers parties to such rates. This is my next exhibit, No. 103, consisting of two pages.

(Complainants' Exhibit No. 103, Witness Boden, received in evidence.)

This exhibit indicates, for example, in the first line, the average haul from the P. & W. V. mines in the Pittsburgh district to Cleveland, which is 160 miles. There is shown

under the heading "Rates" the former rates, which are those that were in effect prior to August 1, 1932, and the present rate.

The next column indicates the rate which would apply under the Docket No. 23922 scale, 185 I. C. C. 225, for 160 miles, which is $1.55. There is next shown that for the same haul of 160 miles, the rates under the Holmes & Hallowell scale would be $1.90.

Taking Ohio No. 8, it will be seen that from the W. & L. E.-[fol. 1210] Erie distance is 156 miles to Cleveland. Under both the 23922 and the H. & H. scales, the rate would be the same as from Pittsburgh.

In this connection, I want to call attention to the fact that these two comparisons as illustrated are from mines on the two railroads which first voluntarily reduced the rates from their respective origin groups. (593) In other words, the W. & L. E. and the P. & W. V. Railways.

Similar comparisons are shown from other competitive origin districts.

The second page indicates the percentages the former and present rates are of Docket 23922 and of the H. & H. scales. For instance, from Pittsburgh, the former rate to Cleveland via the P. & W. V.-W. & L. E. route was 119 per cent of the 23922 scale, the present rate being 100 per cent of that scale. While under the H. & H. scale the former rate was 97 per cent and the present rate is 82 per cent of the H. & H. scale.

There is also indicated the same information from Ohio No. 8 mines to Cleveland via all routes as well as via the W. & L. E.-Erie route which is approximately 156 miles. The former rate, as is indicated hereon being 112 per cent of the Indiana scale and the present rate 94 per cent; while under the H. & H. scale the former rate was 92 per cent and the present rate being 76 per cent of the H. & H. scale.

Docket 23922 is the Illinois Indiana Coal Trade case.

There is also indicated the same information from other origins to Cleveland and other northeastern Ohio destinations. From some districts, as will be noted herein, there [fol. 1211] are two distances and two rates indicated. For example, from Crooksville to Cleveland (594) there is indicated the route of the Pennsylvania and the Wheeling & Lake Erie, with shorter mileages and lower rates than apply from mines on the B. & O. and New York Central. I

think that with these illustrations the exhibit is self-explanatory. I want, however, to call attention to the averages indicated at the bottom of the percentage columns. It will be noted that the former rates from these competing Ohio districts were 97 per cent of the 23922 scale, while the present rates average 85 per cent of that scale. The former rates averaged 78 per cent of the H. & H. scale while the present rates averaged 68 per cent of that scale. Compared with this, the former rate from Pittsburgh to Cleveland was 119 per cent of the 23922 scale, while the present rate is 100 per cent of that scale, whereas, in the case of the comparative rates they are but 85 per cent.

By Mr. Webber:

Q. May I ask a question for information, Mr. Boden? I am not sure I understood you in what you said about the average miles you show. My understanding is that in Docket 23922 the commission's order provided that the rates from each group (595) shall be based on the average of the distances over the shortest existing tariff routes over which joint or single line rates apply from mine points in the group. Do I understand that you have followed [fol. 1212] that provision of the order in showing the distances on this exhibit?

A. No sir, I have not used that method, and had I used that method the percentages of that scale would be very considerably higher than what I show here.

On exhibit 102 the asterisk refers to respondent's figures in I. & S. 3801. I mean by that that those are the distance figures that the P. & W. V. Railroad relied upon in presenting its case to the Suspension Board.

Docket 23922 has not been reopened so far as the level of the rates is concerned—only as to the method of computing distances from certain origins to various destinations. If the commission should find that the method of figuring distances beyond 130 miles would be the shortest line distance, regardless of the tariff route (596), it would make the figures on my exhibit a considerably greater percentage of that scale, because as these figures are computed they are via all tariff routes, which would be considerably longer.

Going back to sheet 2 of exhibit 103—in other words, the rates reduced from the P. & W. V. mines are still 18 per cent higher than are those compared rates when we use the 23922 scale as a yardstick. Again, the former Pittsburgh to Cleveland rates were 97 per cent of the H. & H. scale while the reduced rates are 82 per cent, whereas the compared rates were 78 per cent and the present rates are now 68 per cent of the H. & H. scale, or about 20 per cent [fol. 1213] higher from the Pittsburgh district These figures I am taking from the lowest line on sheet 2. They are arrived at (597) by taking the total distances of those mines, and then having done that, taking the total rates under each of these scales and that will give you your average at the bottom. They may or may not be the same as the average totaling the figures under those columns. They are not an average of averages. Nowhere in any of my exhibits have I used an average of averages of anything.

In this connection, I want to call attention to the fact that in establishing ex-river rates from Conway and Colona the commission made them on the basis of 75 per cent of the H. & H. scale, and in that instance both the rates involved were applicable on ex-water borne coal. (598) The rates to Youngstown involved in the Colona and Conway case were ex-river, and the rates of the Holmes & Hallowell scale were ex-lake.

(601) I would like to call attention also to the fact prevailing as between Pittsburgh and Cambridge to Cleveland, indicated on page 4. The distance from Cambridge to Cleveland is 200 miles, and from the P. & W. V. Pittsburgh district, 160 miles, or 40 miles less, but as will be noted, the rate from Cambridge is less than from Pittsburgh despite the difference of 40 miles in favor of the Pittsburgh district.

[fol. 1214] I also call attention to the Pittsburgh to Cleveland rate versus that from Cambridge to Akron. Here the distance from Cambridge to Akron is 14 miles greater than the P. & W. V. Pittsburgh to Cleveland, while the rate is $1.28, or 27 cents lower than the P. & W. V. Pittsburgh to Cleveland reduced rate.

By Mr. Gutheim:

(602) Q. What have you to say, Mr. Boden, with respect to the basis upon which eastern Ohio comes into the nearby Pittsburgh territory.

A. Eastern Ohio has for many years enjoyed to Buffalo and Erie the same rates as apply from Pittsburgh. In other words, when we on the eastern side of the Pennsylvania-Ohio state line ship into Ohio, we have long paid a differential of ten cents over the eastern Ohio districts and as matters now stand, from most of the Pittsburgh district we are are now paying 39 cents more. To Youngstown, just over the Pennsylvania state line, Pittsburgh and Ohio No. 8 pay the same rate although Ohio No. 8 has a 25 mile longer haul. When, however, eastern Ohio comes over into our territory into the Erie and Buffalo markets it gets the same rate that we pay. Ohio No. 8 has no rates east of the Genesee River line into Trunk Line territory.

[fol. 1215] My next exhibit is a two-page exhibit which sets up statistically and graphically the distance and rate relationships of Pittsburgh and Ohio No. 8 with respect to destinations west and east of the Ohio state line.

(Complainant's Exhibit No. 104, Witness Boden, received in evidence.)

(603) The first page of this exhibit shows in tabular form at the top part thereof, the mileages and the rates applicable from the Pittsburgh and Ohio No. 8 districts to Cleveland, Lorain and Akron. It also indicates what the differences are Pittsburgh in excess of Ohio No. 8 in distances and in the rate. As illustrating the point, from Pittsburgh to Cleveland it will be noted that the excess haul from Pittsburgh is only 18 miles, but the rate difference, however, is 39 cents, as compared with Ohio No. 8. That 39 cents is against Pittsburgh.

Reversing the situation where the Ohio No. 8 district ships into territory nearer to Pittsburgh than to Ohio No. 8, the mileage Ohio No. 8 over the Pittsburgh district is approximately that of the Pittsburgh district over Ohio No. 8 when we ship into northeastern Ohio, but there is no difference in the rate; in other words, beginning at Youngstown and going east, Ohio No. 8 invariably has excess hauls ranging from 25 miles at Youngstown to 43 miles at Buffalo and Rochester, and does not pay an additional penny for the [fol. 1216] extra service.

Sheet 2 of this exhibit shows in a descriptive detail the situation typified on the first page; in other words, we show the location of Youngstown with respect to Pittsburgh and

No. 8 districts on the one side of the page and the location of Cleveland and Buffalo with respect to the same origin districts on the other side of the page. The distances (604) and rates as well as the excess hauls and the differences in rates, if any, are indicated at the bottom of this sheet.

My next exhibit, No. 105, shows in detail the rate changes from the Ohio origin fields to Ohio destinations.

(Complainant's Exhibit No. 105, Witness Boden, received in evidence.)

This is a 3 page statement, which shows the rates from Ohio origin groups to representative Ohio destinations. This exhibit shows the rate in effect immediately prior to August 1, 1932, and the changes in such rates effective on and subsequent to August 1st, either by voluntary action of these defendants, or by order of the Public Utility Commission of Ohio, via each of the separate origin railroads from the individual coal districts.

Where no rates are indicated, there have been no changes in the rates to that destination. For example: To Mansfield, Ohio, no rates are shown from certain origin groups. That does not imply that there are no rates published, but [fol. 1217] merely indicates that the present rates are the same as those in effect prior to August 1, 1932. The only origin group where there has been a change in the rates to Mansfield is from the Cambridge district, and such changes are indicated on the first and second pages.

(605) I have computed and have an exhibit showing comparatively the distances for the hauls on the various rates which are in one way or another involved in these proceedings.

(Complainants' Exhibit No. 106, Witness Boden, received in evidence.)

This exhibit, as indicated at the top, shows the average of all tariff routes from all of the mines in each of the districts indicated at the left hand side of the page, to specific destinations in this northeastern Ohio territory with the average distance to seven destinations combined in the last column, from the southern districts. There is also indicated the average distance from origin groups which have common rates, for example, Pittsburgh and Freeport take

the same rate to Akron, Cleveland and Youngstown. You will note we have shown the combined Pittsburgh-Freeport averages to these points, which are 151 miles to Akron, 176 to Cleveland and 100 miles to Youngstown. The same compilations have been made from the Ohio districts as well as from the southern districts as shown on the exhibit.

(606) I was present at the hearing before the Suspen-
[fol. 1218] sion Board of the Interstate Commerce Commission in connection with the application of the trunk lines to the commission to suspend the then proposed rates of the Pittsburgh and West Virginia.

Q. In that connection have you considered the contention made by those protesting trunk lines there and here with respect to the revenue losses that would result if the P. & W. V. Railway proposed reductions became effective?

A. I recollect something was said about the spread of these reductions if the proposal of the P. & W. V. became effective and that it would cost the carriers something like $29,000,000 a year, or $44,000,000 a year. There has been no spread of the reduction beyond what was then proposed by the P. & W. V. That was, I think, September 1 or September 9.

In other words, thus far, under those computations they have saved about one-third of $29,000,000 or $44,000,000.

The then proposed and now effective rate from the P. & W. V. mines from Cleveland is exactly 100 per cent of the commission made scale in 23922.

In this connection I have made, with respect to various northeastern Ohio destinations, a comparison of what the rates from the various Appalachain producing districts would be on (607) the 23922 scale with what they actually are. This exhibit, No. 107, consisting of three pages, indi-
cates what the average miles via all tariff routes are, what
[fol. 1219] the present rates are, and what the rates would be if made on the basis of Docket 23922 scale from individual origin districts indicated at the left side of the page.

(Complainants' Exhibit No. 107, Witness Boden, received in evidence.)

The rates beyond the maximum distance prescribed by the commission having been progressed by me at the same rate at which the Commission progresses as prescribed in its highest brackets of distance in that scale; i. e., 8 cents

for each 25 mile block beyond 300 miles. Take Akron, Ohio as illustrated and indicated on the first sheet; it will be noted that the present rates from all of the Appalachian fields shown average $2.02 per net ton. If these districts were on the Docket 23922 scale they would average $2.12 per ton, or a level 10 cents per ton higher than the present rates in effect to Akron. The same situation would be true as to the other destinations indicated on these three pages, that is, that the Docket 23922 scale would increase the present average from 10 cents per net ton to 20 cents per net ton over the present rates.

I do not wish it to be understood that I am proposing in (608) any way that the scale of rates prescribed in Docket 23922 as I have said, should be substituted for the present rates from these districts

[fol. 1220] I am not intending that this exhibit is to be understood as in any way presenting the view on my part that the 23922 scale extended as I have said should be substituted for all of these rates. There is no suggestion along that line in our complaint. The purpose of this exhibit is to demonstrate, as it does demonstrate, that the level of the 23922 scale is higher than the level of rates now applicable from the northern Appalachian fields to these northeastern Ohio destinations, and accordingly that 23922 scale is a fair measuring rod to be used by the commission in considering these rates.

My next exhibit, No. 108, consisting of two pages, shows with respect to Akron, Canton, Cleveland and Lorain the extent to which the present rates from these northern Appalachian producing districts vary in cents per ton from what the rates from those districts would be on the 23922 scale.

(Complainants' Exhibit, No. 108, Witness Boden, received in evidence.)

Taking the first page, it shows that from the Pittsburgh-Freeport district the present rate of $1.72 to (609) Akron for a haul of 151 miles is 17 cents higher than the 23922 scale for that distance, which as indicated on this page would be $1.55. Taking the Ohio No. 8 district it indicates that the present rate is the same as the Docket 23922 scale: [fol. 1221] the rate from the Middle district is 7 cents less

than the scale. From Massillon the present rate is on that scale.

Taking the three Ohio districts shown it will be found that the average present rate is 2 cents under the 23922 scale. Taking the southern inner Crescent districts which have a $2.39 rate to Akron, that rate averages 18 cents less than what the average would be on the 23922 scale; in the case of the three southern Outer Crescent districts which have a present rate of $2.64 to Akron, the rates based on the 23922 scale would average 2 cents higher. This description indicates how the exhibit may be read with respect to the other destinations. This exhibit further illustrates the handicap of the Pittsburgh district.

I have compared rates from Pittsburgh and these other Appalachian producing districts to the same four northeastern Ohio destinations, Akron, Canton, Cleveland and Lorain with the Holmes and Hallowell scale of rates. I offer my next exhibit, No. 109, consisting of two pages, as illustrating the situation with respect to the Holmes & Hallowell scale in the same manner as was just illustrated by comparison (610) with the 23922 scale.

(Complainants' Exhibit) No. 109, Witness Boden, received in evidence.)

[fol. 1222] This indicates that where the rate from Pittsburgh to Akron is 18 cents less than what the rates would be on the Holmes & Hallowell scale, the average rates from Ohio No. 8, Middle and Massillon are 22 cents less; from the group of southern high volatile districts they are $1.29 less, and from the group of three southern Outer Crescent districts they are $1.19 less. You can read the exhibit with respect to other destinations in similar fashion.

I have made a similar comparison to these same four Ohio destinations to show on the basis of percentage of the 23922 scale, just how the western Pennsylvania rates compare with the rates from eastern Ohio and from the southern Inner and Outer Crescent districts. My next exhibit, Exhibit No. 110, of two sheets, shows, taking Akron as an illustration, that from the Pittsburgh-Freeport district the present $1.72 rate is 111 per cent of the 23922 scale.

(Complainants' Exhibit No. 110, Witness Boden, received in evidence.)

Taking the Ohio No. 8, Middle and Massillon as indicated, they average but 98 per cent of the scale. (611) Taking the southern high volatile districts where the rate is $2.39 they average but 93 per cent of the scale. The southern low volatile districts which take $2.64, average 99 per cent of this scale. These percentage comparisons indicate [fol. 1223] all the more forcefully the handicap under which the Pittsburgh district ships into northeastern Ohio as compared with the Ohio coals or the southern high and low volatile coals.

I have made a similar percentage comparison, using the Holmes & Hallowell scale as the measuring stick, to show the relative levels of the rates from these northern Appalachian producing districts to the same four Ohio destinations.

This two page exhibit, No. 111, shows, using Akron again as a typical example, that from the Pittsburgh-Freeport district the present rate of $1.72 is 91 per cent of what that rate would be for the same haul to the Holmes & Hallowell scale. From the three Ohio districts shown that average is but 83 per cent of the Holmes & Hallowell scale, while from the southern Inner Crescent district it is 65 per cent of the scale and the southern Outer Crescent districts 69 per cent of the scale. The same illustrations will apply for the other points indicated on the exhibit.

(Complainants' Exhibit No. 111, Witness Boden, received in evidence.)

(612) My next exhibit, No. 112, shows the relationship from the Pittsburgh and from the Ohio No. 8 districts to these four northeastern Ohio destinations combined and the relation of the present rates to the 23922 scale on a [fol. 1224] percentage basis and compares the results with a similar showing for the important southern districts. It is enough to refer to the average percentages. These demonstrate that the average Pittsburgh rate to Cleveland, Akron, Canton and Lorain combined is 109 per cent of the 23922 scale and there is nothing from any of the other districts that approximates this level.

(Complainants' Exhibit No. 112, Witness Boden, received in evidence.)

I have made a similar comparison of the average rate from the same producing districts to the same four northeastern destinations using the percentage of what the rates would be of the Holmes & Hallowell scale as the measuring stick. That is shown in my Exhibit No. 113.

(Complainants' Exhibit No. 113, Witness Boden, received in evidence.)

(613) This will indicate that the Pittsburgh district to these four Ohio destinations combined has an average rate equal to 89 per cent of the Holmes & Hallowell scale. Ohio No. 8 has an average of 80 per cent, and the rates from the southern districts range from 61 to 69 per cent.

[fol. 1225] I also have exhibits which show of themselves these scales that I have used in these comparative exhibits as measuring sticks. The first exhibit, No. 114, is a scale prescribed by the commission in Docket No. 23922, 185-ICC-225, usually spoken of as the Illinois-Indiana scale of rates.

(Complainants' Exhibit No. 114, Witness Boden, received in evidence.)

The second exhibit, No. 115, is the scale prescribed by the commission in 69-ICC-11, usually referred to as the Holmes & Hallowell scale.

(Complainants' Exhibit No. 115, Witness Boden, received in evidence.)

I have made some comparisons with respect to the rates from the Pittsburgh-Freeport districts to the territory involved herein, with the rates for similar or greater distances, applying in this general territory. Before I go into the detail as to these comparisons (614), I want to state that on these rate comparison exhibits I have used only Pittsburgh as illustrative. If you will refer to my Exhibit No. 106 you will note that the average distance from the Pittsburgh-Freeport district combined is practically identical with that from Pittsburgh. I therefore have used Pittsburgh as typical of Pittsburgh-Freeport combined.

Exhibit No. 116 shows the comparisons of the rate to Youngstown, Ohio.

[fol. 1226] Complainants' Exhibit No. 116, Witness Boden, received.)

For an average distance from Pittsburgh of 99 miles we have a rate of $1.34 per net ton.

From Ohio No. 8 to Akron for a haul of 114 miles, the voluntarily maintained rate of these defendants is $1.28, or 6 cents per ton less than from Pittsburgh.

There is shown at the bottom the average haul and the average rate to these compared points, which is 109 miles for an average rate of $1.20 per net ton, 14 cents per ton less than our rate to Youngstown, upon which there is customary very heavy tonnage moved.

The average haul from the combined Pittsburgh-Freeport group to Youngstown of 100 miles as shown by Exhibit No. 106, is 92% of the average haul of 109 miles to these compared points. If we take 92% of the average rate as shown here of $1.20, the (615) rate from the combined Pittsburgh-Freeport districts would be $1.10 and not $1.34 as now applicable. All of these compared rates are voluntary rates of these defendants.

I have in mind that the carriers' answers to the Western Pennsylvania complaint, in addition to admitting undue prejudice that is charged in that complaint, refers to the fact that it is occasioned by rates mandatory or permissive of the Ohio Commission. There is nothing in the permissive feature that has, as I understand it, in any way obli- [fol. 1227] gated these carriers to maintain these rates.

My next Exhibit No. 117 is a similar comparison as that described for Youngstown, but using Canton, Ohio, as a destination.

(Complainants' Exhibit No. 117, Witness Boden, received in evidence.)

(616) Here for a haul from Pittsburgh to Canton of 139 miles, the rate is $1.59 per net ton. From Ohio No. 8 to Cleveland and Lorain for hauls of 155 and 149 miles respectively, the rate is $1.45. Taking the rate from Fairmont to Youngstown of $1.52, we find the haul is 163 miles, or 24 miles greater than is Pittsburgh to Canton, yet the rate from Fairmont is 7 cents less. Based on earnings per ton mile, we find that the Pittsburgh to Canton rate would produce earnings of 11.4 mills. The earnings of the compared rates would range from 8.4 to 10.6 mills per ton mile, and taking the average of all the compared rates, they earn 9.4 mills per ton mile.

If the rate from Pittsburgh were based on an earning of 9.5 mills per ton mile, we would have a rate of 1.32 rather than $1.59 now applicable.

My next exhibit No. 118, shows the situation with respect to the Pittsburgh to Akron-Cleveland-Lorain rates.

(Complainants' Exhibit No. 118, Witness Boden, received in evidence.)

[fol. 1228] I would like to point out only a few of the situations as pictured here.

From Pittsburgh to Akron for a haul of 151 miles, the rate is $1.72. From Ohio No. 8 to Cleveland as here shown, the haul is 155 miles, while the rate is $1.45. For a haul four miles greater from No. 8 to Cleveland than is Pittsburgh to Canton, the Ohio No. 8 mines pay 27 cents per ton less.

(617) From Pittsburgh to Cleveland the haul is 175 miles and the rate is $1.84. From Cambridge to Lorain the distance is 177 miles and the rate is $1.45. From Crooksville to Akron for a haul of 176 miles, the rate is $1.60. From Belleville, Ill., to Champaign, Ill., for a haul of 174 miles, the rate is $1.55. Here again, where the length of hauls is practically identical with that from Pittsburgh to Cleveland, the rates range from 12 cents to 27 cents per ton less.

From Pittsburgh to Lorain for a haul of 199 miles, the rate is the same as to Cleveland, or $1.84. Cambridge to Cleveland has a haul of 202 miles and the rate is $1.45, or a rate 39 cents less for approximately the same distance. From Hocking the distance is 257 miles while the rate is $1.60. Here for a haul of 58 miles greater than from Pittsburgh to Lorain, the rate is 24 cents per ton less. These illustrations are amplified throughout this exhibit.

Looking at these comparisons from another standpoint, we find that from Pittsburgh to Akron the haul is 151 miles; from Hocking to Cleveland the haul is 257 miles, [fol. 1229] or 106 miles greater; but the rate from Hocking to Cleveland is 12 cents less than the rate from Pittsburgh to Akron. This same kind of illustration is multiplied any number of times on this exhibit.

Taking the distances of the compared rates, you will note that these range from 143 miles to 279 miles, and as indicated (618) at the bottom of the exhibit, the rates average

$1.52 or 20 cents per ton less than the lowest rate from Pittsburgh to the three destinations shown.

Taking the top bracket of these compared rates, starting at Ohio No. 8 to Cleveland, down to the Brazil-Clinton group to Chicago, you will find that for hauls ranging from 143 miles to 168 miles, the rates will average $1.46 per ton. This in comparison with the Pittsburgh to Akron haul of 151 miles for a rate of $1.72, or 26 cents per ton higher than the average of this group.

If we take the average rate of the last two compared brackets, it will be found that from these 15 groups there is an average rate of $1.55 for hauls ranging from 176 to 279 miles; this as compared with a haul from Pittsburgh to Cleveland and Lorain of 175 and 199 miles, respectively, but where the rates from Pittsburgh range from 17 cents to 29 cents per ton higher than from such compared districts.

[fol. 1230] Exhibit No. 119, my next exhibit, shows comparisons with the rate from Pittsburgh to Mansfield, Ohio.

(Complainants' Exhibit No. 119, Witness Boden, received in evidence.)

(619) From the Pittsburgh district to Mansfield, for a haul of 208 miles, the rate is $2.03.

From Ohio No. 8 to Toledo for a haul of 230 miles the rate is $1.89. Here the haul is 22 miles greater but the rate is 14 cents per ton less.

From Massillon to Detroit for practically the same haul as from Pittsburgh to Mansfield, the rate is 18 cents less than the Pittsburgh to Mansfield rate.

As indicated at the bottom of this exhibit, these compared rates average $1.86 for distances ranging from 201 miles to 249 miles. Compared with these, Pittsburgh to Mansfield for a haul of 208 miles pays $2.03. The haul from Pittsburgh being almost identical with the shortest haul of the compared rates. These illustrations will suffice to indicate how the other comparisons on this exhibit may be read.

On Exhibit No. 120 I have taken the Pittsburgh to Marion, Ohio, distance of 251 miles with the rate of $2.14 and compared that with the rates for similar or greater hauls.

(Complainants' Exhibit No. 120, Witness Boden, received in evidence.)

[fol. 1231] I would like to illustrate a few of those shown:

(620) From Hocking to Cleveland for a haul of 258 miles, the rate is $1.89; here, the length of the haul is greater than from Pittsburgh to Marion, but the rate is 25 cents per ton less. It might be well also to refer to my Exhibit No. 118 where there is shown that from the same Hocking group to Cleveland for a haul of 257 miles, the rate is $1.60, or 29 cents less, although the haul is approximately the same.

From Fairmont to Cleveland for a haul approximately the same as from Pittsburgh to Marion, the rate of $1.99 is 15 cents less.

Taking the exhibit as a whole, it shows that for distances ranging from 254 to 312 miles the rates range from $1.60 to $2.14 and average $1.97. In no instance is the shortest haul as low as that from Pittsburgh to Marion, yet the rates generally are very materially lower.

Marion is within the destination territory described in our complaint as northeastern Ohio.

My exhibit No. 121 shows the excess distances from other origin groups over those from Ohio No. 8 and Pittsburgh.

(Complainants' Exhibit No. 121, Witness Boden, received in evidence.)

[fol. 1232] (621) This exhibit indicates what the excess distances are from the southern groups over those from the Ohio No. 8 district, into this northeastern Ohio territory. As an illustration, Kanawha, the first group listed, is shown to be 289 miles farther from Akron than is the Ohio No. 8 group district; at Cleveland the Kanawha district is 259 miles greater than the distance from the Ohio No. 8 group. At Youngstown I have made the computation using the Pittsburgh group as the base district.

I offer as Exhibit No. 122 a statement showing the distances, rates and the amount. The present rates are less than what the Docket 23922 scale would be, from the Fairmont district. It will be noted that to Akron, Canton, and Youngstown, there are two or more rates from Fairmont. At Akron it can be seen that from the mines on the B. & O. and Western Maryland Railroads, the rate is 5 cents less than from the mines on the Monongahela; at Canton there are three sets of rates, the lower rate being applicable from mines on the Cheat Haven & Bruceton Branch of the B. & O.

At Youngstown there are also three sets of rates. At Cleveland and Lorain it will be noted that there is a common rate from all mines in the Fairmont district.

In the fourth column there is shown what rate would apply (622) under Docket 23922 scale, and in the last column there is indicated the amount in cents per net ton [fol. 1233] the present rates are less than the 23922 scale.

(Complainants' Exhibit No. 122, Witness Boden, received in evidence.)

I also have the same kind of comparison from Fairmont, but using the Holmes & Hallowell scale as a yardstick. This is shown on my Exhibit No. 123. I have used the same mines as in the next preceding exhibit, and in the fourth column is shown the rate that would apply by use of the Holmes & Hallowell scale as the measuring rod, while in the last column is shown the amount the present rates are less than the Holmes & Hallowell scale.

(Complainants' Exhibit No. 123, Witness Boden, received in evidence.)

My next exhibit, No. 124, shows the tariff authority for all rates and distances used in my exhibits.

(623) For the year 1929 the production of the members of our bureau was better than 21,000,000 tons; for the year 1930 it dropped to 16,000,000 plus. For the year 1931 it dropped to a fraction over 12,000,000 tons.

(624) I have referred to the fact that from some of these districts there is more than one rate and sometimes more than two rates to the same destinations. For example, on Exhibit 118, I show Crooksville to Akron, 176 miles for $1.60, and Crooksville to Akron, 260 miles for $1.53. That [fol. 1234] is an instance of what I had in mind of different rates via different routes from the same district.

It is pointed out that on Exhibit 117 I show two rates Fairmont to Youngstown, $1.58 and $1.52. The rates as indicated there are the rates that apply via certain specified routes named on exhibit 124. The $1.52 rate, according to my understanding of it, will apply from, I think, one mine in the Fairmont district, but it is not the going rate. I refer (625) to my exhibit 122 showing the Cheat Haven and Bruceton Branch of the B. & O. It is my understanding that that is considered in the Fairmont district, and is

shown in the tariffs. If I am not correct, I will stand corrected as the tariff indicates it. It may be that we would have to change it from the Fairmont to the Cheat Haven and Bruceton district. (626) It is not in the Fairmont or Connellsville District but that is the correct distance and the correct rate for that particular branch.

[fol. 1235] HARRY G. KENNEDY was called as a witness and, having been duly sworn, testified as follows:

Direct examination.

By Mr. McVann:

Harry G. Kennedy (627) Charleston, West Virginia. I am combustion engineer for the Kanawha Coal Operators Association. I have had an exhibit prepared, consisting of four sheets, containing tonnage figures showing the movement of coal from specified West Virginia districts to destinations in northeastern Ohio.

(Complainants' Exhibit No. 125, Witness Kennedy, received in evidence.)

The figures are taken from the reports of the Ohio Bureau of Coal Statistics, an organization maintained by the railroads for collecting such statistics. The destinations shown are Akron, Alkali and Painesville, Alliance, Cleveland, Canton, Lorain, Massillon, and Youngstown groups. The figures cover the entire years 1929, 1930, and 1931, and the months from January to October, inclusive, of 1932. (628) The October, 1932, figures and the total for 1932 will be found on sheet 4 of the exhibit. It is not fastened to the three original sheets. I might explain that all the tonnage figures on this exhibit are taken from the same source as those shown by Mr. Kern in his exhibit No. 50, but Mr. Kern's figures do not go beyond July, 1932. There is also a minor difference in that this exhibit shows New River and Winding Gulf separately, while Mr. Kern grouped that under New River. Mr. Kern also used Kanawha as a single district, while this exhibit shows Kanawha and Logan bracketed. In the railroad tariffs and statistics Logan is always included in the Kanawha District.

[fol. 1236] Mr. McVann: Mr. Kern inquires what the witness calls Winding Gulf, and for fear the witness might not be able to answer that question I am going to answer it myself. The Winding Gulf tonnage, as indicated on this exhibit, is that which originates on the Virginian Railway.

Mr. Gutheim: In what district?

Mr. McVann: It is called by the railroads usually New River, but there is a separate operators' organization in the Winding Gulf District on the Virginian Railway and they like to have their tonnage designated under that name rather than included in New River.

Mr. Gutheim: Is it an entirely low volatile district?

Mr. McVann: Yes.

Mr. Ballard: Then, Mr. McVann, from a rate district point of view it would be proper to combine Winding Gulf figures and the New River figures on this exhibit?

Mr. McVann: Yes, and also the Tug River and the Pocahontas on the Norfolk & Western.

Mr. Ballard: They are all $2.64?

Mr. McVann: They are all low volatile coal and while they are separate rate districts on the railroads, they are combined in one operators' association. I got those figures from the Ohio Bureau of Coal Statistics. I also got the Ohio figures from that bureau. (629)

[fol. 1237] L. E. Woods was called as a witness and, having been duly sworn, testified as follows:

By Mr. McVann:

(630) L. E. Woods, Huntington, West Virginia. I am president of the Crystal Block Coal and Coke Company. I have been engaged in the coal producing business twenty-eight years. Our operations are located in the Williamson Field, of Southern West Virginia, which is shown on the tariffs of the Norfolk & Western Railway as the Thacker-Kenova district. The coal producers of that field are organized in an association known as the Operators Association of the Williamson Field. I am and have been for several years president of that association, and am offering my testimony on behalf of the Association.